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NEW JERSEY

SCHOOL LAW

DECISIONS

January 1, 1986 to December 31, 1986

VOLUME 2

PAGES 775-1578

Saul Cooperman
Commissioner of Education

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BOARD OF EDUCATION OF THE CITY OF GARFIELD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
CITY COUNCIL OF THE CITY OF GARFIELD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the recommended report and decision rendered by the Office of Administrative Law. It is observed that exceptions were filed by the Board pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Commissioner observes that certain modifications to the recommended decision are required for the purposes of further clarification before addressing the Board's exceptions. They are as follows:

1. The opening paragraph is modified to read as follows:

   As proposed by the Board, the budget provided $7,630,000 for current expenses and $188,908 for capital outlay to be raised in the local tax levy.

2. The last sentence in the same paragraph is modified to read:

   Thus, on May 7, 1985 the City approved the sum of $7,447,300 for current expenses and $188,908 for capital outlay to be raised in the local tax levy for the 1985-86 school year.

3. Under Findings of Fact No. 4, "Merger of Department Heads" in the first paragraph it is indicated that the City deducted $35,000 for anticipated savings in Account 213. This figure is determined to be $36,000 as stated in Conclusions of Law, paragraph one.

4. Sentence one, paragraph one under Conclusions of Law is modified to read as follows:

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Based on the foregoing facts and applicable law, I CONCLUDE that the sum of $40,000 must be restored to the account for lawyers' fees***.

The Board excepts to those findings of the ALJ which sustain in whole or in part Council's reductions in its 1985-86 budget proposal in the areas of guidance counselors ($36,000), high school administrator ($18,000), secretaries' salaries ($5,500) and operation of plant ($40,000). The Board argues that its proposed budget for the 1985-86 school year is based upon the essential minimal amount of funds required to implement a thorough and efficient system of education. The Board maintains that all of Council's reductions sustained impact upon the salaries and positions of professional and nonprofessional staff which, if upheld by the Commissioner, would make it impossible for the Garfield City School District to achieve its stated educational goals and objectives related to those programs affecting high school administration, pupil guidance, fiscal accountability and the overall operation of its school plant.

The Board further maintains that the testimony of its witnesses attesting to the need for the full restoration of Council's $183,500 reduction in current expenses for the 1985-86 school year stands unrefuted on the record.

Finally, the Board argues that the ALJ's findings and determination in this matter totally ignore the significance which must be accorded to the Commissioner's determination to grant a $365,825 cap waiver to the City of Garfield School District for the 1985-86 school year. In granting such a T&E cap waiver the Board argues that the Commissioner clearly recognized that all of the 1985-86 funds requested for current expense purposes were required for the implementation of a thorough and efficient system of education.

The Commissioner upon review of the Board's exceptions to the recommended decision is not persuaded that the Board has met its required burden of proving that a total restoration of the $183,500 reduction imposed by Council in the current expense tax levy for the 1985-86 school year is justified.

A review of the Board's cap waiver application which was approved for the 1985-86 school year does not support its contention that it has been denied those funds designated for the programs related to the reasons given for such cap waiver.

It is clear from a review of those findings and conclusions in the recommended decision that the ALJ properly determined that the factual evidence and testimony presented by the Board fails to justify a restoration of more than $84,000 for current expense purposes which is to be included in the local tax levy for the 1985-86 school year.

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Accordingly, the Commissioner adopts the recommended report and decision as modified herein and hereby orders the Bergen County Board of Taxation to make the necessary adjustment in the local tax levy for the 1985-86 school year which restores $84,000 in current expense appropriations.

This amount $84,000 when added to the $7,447,300 originally certified by Council shall be $7,531,000 for current expense purposes.

The above determination issued by the Commissioner is directed solely and exclusively toward the adequacy and availability of those funds necessary to be appropriated to fund the 1985-86 budget without regard to any other prior financial obligations which it may be necessary for the Commissioner to address in the future.

In all other respects the instant Petition of Appeal can be and is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4324-85
AGENCY DKT. NO. 170-6/85

BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP,
Petitioner,
v.
BOARD OF SCHOOL ESTIMATE AND CITY COUNCIL OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,
Respondents.

Melvin Randall, Esq., for petitioner
(Love & Randall, attorneys)

Cecil J. Banks, Esq., for respondent
(Sills, Beck, Cummis, Zuckerman, Radin, Tischman & Epstein, attorneys)

Record Closed: January 3, 1986 Decided: February 10, 1986

BEFORE **STEPHEN G. WEISS,** ALJ:

This school budget appeal challenges the elimination by respondents in March 1985, of the entire capital outlay portion of the 1985-86 budget adopted by the Board of Education of the City of Orange. The case was transmitted to the Office of Administrative Law in July 1985 and a prehearing conference was conducted in September 1985. At that conference it was agreed that the sole issue was whether the Board would be able to provide a thorough and efficient system of free public education to the

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students of Orange absent the restoration of all or any part of the capital outlay monies ($461,900) eliminated by the respondents. However, at the hearing, respondents raised an additional issue related to an alleged procedural deficiency in connection with the processing of the budget by the Board to the Board of School Estimate.* Both issues will be addressed in this Initial Decision.

TESTIMONY FOR PETITIONER

Two witnesses testified on behalf of the Board - Patrick J. Pelosi, Board Secretary/Business Administrator, and Thomas S. Goas, a licensed architect and an employee of a consulting firm which the Board engaged in 1984 with respect to a study of its physical facilities.

Pelosi has served as Board Secretary/Business Administrator for about two years. He also serves as secretary to the Board of School Estimate. In addition, since 1972, he has been an Associate Superintendent of Schools. He explained that preparation of the Board's 1985-86 budget began early in the 1984-85 school year, and involved the collection of data and submission to senior administration personnel for review and transmittal to the Board. On January 21, 1985, the Board met and adopted a proposed 1985-86 budget. It anticipated that the sum of $461,900 would be raised by way of local taxation for capital outlay purposes. (Exhibit P-2).

Following the Board's adoption of the proposed budget, and its review by the Essex County Superintendent of Schools, the budget was sent to the Board of School Estimate. See, N.J.S.A. 18A:22-7. At a meeting of the Board of School Estimate on March 13, 1985, a motion was made to adopt a school budget with the reduction of $150,000 for current expenses, and the total elimination of the capital outlay amount of $461,900. The motion was passed unanimously. Thereafter, the Board determined to appeal only the elimination of the capital outlay of $461,900 (Exhibit J-1).

* Reference herein to the petitioner will be, "Board." The "Board of School Estimate" will be styled as such.

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Pelosi conceded that the only item sent by the Board to the Board of School Estimate in connection with the proposed budget was the budget document itself(Exhibit P-2). Nevertheless, he also identified a certain list entitled "Maintenance Department Request" which delineated the specific expenditures that the Board hoped to make, which totaled $461,900 (Exhibit P-3). Pelosi said that this list had been culled from a longer list of such items which was contained in a facilities study prepared by E.I. Associates and submitted to the Board in November 1984 (Exhibit P-4). According to Pelosi, he and his staff had highlighted only the more critical items in the hope that these particularly pressing needs, which he said involved pupil and public safety, would immediately be addressed.

The items which made up the Board's capital outlay proposal involved work to be done at several of the schools in Orange, together with its stadium site. The proposed expenditures were in the following amounts, for the following facilities:

(1) Forest School ($2,200); (b) Lincoln School ($7,200); (c) Oakwood School ($20,500); (d) Cleveland School ($12,500); (e) Heywood School ($12,500); (f) Central School ($12,300); (g) Park School ($30,500); (h) Orange Middle School ($186,000); and (i) Orange High School ($9,000); and (j) Stadium Field House and Maintenance Building ($169,200).

Pelosi also identified a series of photographs taken during the summer or fall of 1984 showing various items or areas which were listed on the Maintenance Department Request. These included, for example, several photographs of the Orange Middle School, showing the need for both interior and exterior repair, photographs of the Forest and Oakwood Schools, and photographs of the stadium bleachers (Exhibit P-5, 6a to 6d, P-7a, 7b, 7c, 8a, 8b, 8c, 9a, 9b, 9c). According to Pelosi, unless the repairs and replacements listed in the request (which make up the proposed capital outlay of $461,900) are accomplished, there will be a danger to the students in the school district.

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On cross-examination Pelosi conceded that although the internal workup of the Board's capital needs included a list of the specific items needing repair or replacement, none of these specifics was provided to the Board of School Estimate, insofar as he knew. Pelosi conceded, as well, that for about five school years prior to 1985-86, no monies were sought to be raised by way of capital outlay - all repair work was allocated to various "current expense" line items. In answer to a question posed by the undersigned, Pelosi said that all of the items making up the total capital outlay proposal appeared to him to be in the nature of repairs. Thus, as in earlier years, they could just as well been allocated to line items in the current expense budget. However, he decided to lump them together in the capital outlay portion since they dealt with a particularly pressing need and involved facilities which were identified for such work in the facilities study.

Mr. Goas, is an architect and a vice-president of E.I. Associates, the firm that did the consulting work for the Board. He holds a B.A. degree in architecture from Pennsylvania State University and has been a registered architect for more than 20 years, working exclusively in the area of school architecture. He identified Exhibit P-4 as the feasibility study prepared under his supervision. He also noted that he is familiar with the Maintenance Department Request (Exhibit P-3) from which Pelosi had extracted items in particular need of repair. According to Goas, the costs associated with the various repairs, totaling $461,900, were developed by his staff and are reasonable.

Goas's organization had been retained by the Board during 1984 in view of its great concern over the age of its facilities, and the need for repair or replacement. His staff had reviewed all of the school sites closely, and he had also made a visit to them. He then testified about some of the specific items for which the capital outlay monies were sought. In particular, he noted that lockers at the Orange Middle School were in a state of extreme disrepair, and that the $55,000 sought to be raised for that item seemed

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to him to be most appropriate. With regard to a proposed $13,500 expenditure to replace an existing condensation pump and service traps at the Oakwood School, he noted that although the overall heating system at the school is in "fair condition," a failure of the pump to operate would bring the entire system down. That is why replacement of the pump is necessary. Like Pelosi, Goas also felt that the proposed items were in the nature of "repairs," rather than what he would deem to be "capital improvements." To him, a "capital improvement" would involve the creation of additional space, such as the building of a room.

TESTIMONY FOR RESPONDENTS

No live testimony was offered by the respondents. However, the parties had entered into a Joint Stipulation of Facts (Exhibit J-1) which set forth the following:

1. The Petitioner is the Board of Education of the Township of Orange in the County of Essex and is charged by law with the duty of providing and maintaining a thorough, efficient and adequate system of schools in Orange Township School District, pursuant to the Public Education Act of 1975, Chapter 212.

2. The Respondent, Board of School Estimate, is responsible for certification of the school budget to the Board of Education and the governing body pursuant to N.J.S.A. 18A:22-14.

3. The Respondent, City Council, is the governing body of Orange Township, New Jersey.

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4. The Board of Education of the City of Orange Township, at a regular meeting on January 21, 1985, did adopt per resolution and did certify to the Board of School Estimate of Orange Township that the sum of $4,287,256 to be allocated for current expenses, exclusive of state, Federal and other funds, was necessary to be raised by taxes for the operation of the public schools of the City of Orange Township for the school year beginning July 1, 1985 and ending June 30, 1986.

5. As required by law, the Petitioner, Board of Education, submitted to the Board of School Estimate of Orange Township, its proposed budget for the school year July 1985 to June 30, 1986. On March 13, 1985 the Board of School Estimate met, voted and adopted per resolution (annexed as P-1),* the reduced amount of $4,134,256 as necessary for the operation of the public schools of the City of Orange Township for the school year beginning July 1, 1985 and ending June 30, 1986. By its action, the Board of School Estimate eliminated in its entirety the $461,900 for capital outlay for the 1985-86 school year.

6. On March 26, 1985 the Petitioner, Board of Education, after considering the amount of reduction aforesaid by the Board of School Estimate, did per resolution determine to appeal both the reduction of its current expense and its capital outlay budgets. However, on April 9, 1985 the Petitioner, Board of Education, reviewed said reduction and decided to withdraw its appeal for current expenses, but to continue with its appeal of the elimination of $461,900 for its capital outlay budget.

7. On or about May 14, 1985, the governing body of the City of Orange Township, New Jersey, met, certified and adopted per resolution, the amount of $4,134,256 to be raised by taxes for the operation of public schools for the City of Orange Township, New Jersey, thus affirming the reduction imposed by the Board of School Estimate.

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* Exhibit P-1 attached to the Joint Stipulation is a copy of the Board of School Estimate's Resolution of March 13, 1985. Although there was typed thereon a paragraph authorizing $461,900 to be raised for capital outlay purposes, this provision has a line drawn through it.

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DISCUSSION

As noted at the outset of this Initial Decision, the respondents raised an issue at the hearing in addition to the one contained in the Prehearing Order. Specifically, it is the position of the respondents that mandatory statutory requirements pertaining to the school budget process were violated by the Board and, as a result, its petition should be dismissed on that ground alone. While the Board did vote to approve a budget document, as such, it did not, according to respondents, pass any specific resolution or adopt any statement as required by the statute. According to the language of N.J.S.A. 18A:22-18, a board of education in a Type I school district, such as Orange, must, "determine by resolution that it is necessary to raise money for any capital project authorized by law." No resolution to that effect was ever voted upon by the Board. Beyond that, it is then incumbent upon the board to, "prepare and deliver to each member of the Board of School Estimate a statement of the amount estimated to be necessary for such purpose." No such statement was prepared and/or delivered to each Board of School Estimate member. All that the Board of Education sent to the Board of School Estimate in this case was the budget document itself, which merely contained on the third page from the end a reference to line item J-1220c, indicating that $461,900 was to be budgeted for "capital outlay -buildings" (Exhibit P-2). Thus, as respondents put it in their brief, "the Board of School Estimate did not have before it the proper authorized resolution or statement of reasons necessary to make an informed decision on the requested appropriation. This is evidenced by the fact that even the appointed Board members who also sit as Board of School Estimate members voted to deny the $461,900 line item designation to the Board" (Posthearing Brief of Respondents, p. 2).

Petitioner does not dispute that the only document sent to the Board of School Estimate, as conceded by Pelosi, was a budget containing mere reference to the total capital outlay sum involved. However, petitioner asserts that it did honor the statutory requirements since N.J.S.A. 18A:22-18 only requires a statement of the amount needed for capital projects, and that this was actually accomplished.

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At the request of the undersigned the Board, following the closing of the hearing, provided copies of a portion of the minutes of several Board meetings. The transcript excerpt pertaining to the Board meeting of January 21, 1986 (which will be marked as Court Exhibit 1), reveals that a motion was made to adopt a capital outlay budget for 1985-86 in the amount of $461,900. The motion was seconded and voted upon without further discussion. All five Board members voted in favor of the motion and the meeting was soon closed (Court Exhibit 1, pp. 9924 to 9926). Apparently, no formal resolution memorializing the vote was ever prepared; certainly, none was ever sent onto the Board of School Estimate.

The record does not contain the transcript of the meeting of the Board of School Estimate on March 13, 1985, at which the proposed budget was discussed and which resulted in a resolution excluding any amount for capital outlay purposes. However, the exhibit attached to the Joint Stipulation reveals that the Board of School Estimate's decision was to reject any amount to be raised for capital outlay, and the vote was unanimous.

Clearly, the process which involved the transmittal by the Board of the proposed 1985-86 budget to the Board of School Estimate was not in accord with the statute. The record contains no evidence upon which I can rely, insofar as determining what the Board of School Estimate knew or did not know with respect to the specific components of the capital outlay amount sought by the Board.* While personnel in the administration knew the specifics, and while they clearly did some internal workup in order to arrive at the $461,900 figure, there is nothing in the record to even indicate whether or not the five

* I would also note that N.J.S.A. 18A:22-8a(1)(s) requires that there be annexed to the budget an itemized statement showing the amount estimated to be necessary to be appropriated, separately indicated, for capital projects.

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Board members were themselves particularly aware of the specific items which made up the $461,900 capital outlay request. As counsel for respondents accurately noted in the posthearing brief, a transcript of the Board's discussion at a special meeting held on January 15, 1985, reflects an absence of such knowledge. Thus, the excerpt from those minutes (which I am marking as Court Exhibit 2) reflects that the Board was only presented with a bulk figure of $461,900, which they felt was a woefully inadequate amount in any case. Indeed, one of the Board members, Mrs. Kingslow, observed that any figure was arbitrary unless it was "backed up with a proposal, you know, a detailed plan." Another Board member, Mrs. Vincent, then noted that, "We don't do that without a meeting with Mr. Goas, I don't think." Then, Mr. Pelosi, observed that, "it would require more than a meeting with Mr. Goas. It can't happen overnight. It takes several months." (Court Exhibit 2, p. 10045-15 to 10045-21).

Thus, at least some of the Board members themselves were not totally cognizant of the specific ingredients which made up the $461,900 figure, although all were concerned about the pressing need in the school district for upgrading facilities. However, that is not the point here. At issue is whether the Board followed the statutory requirements imposed upon it in connection with the budget process, duly acted to adopt a proper resolution regarding the capital outlay request, and then provided the Board of School Estimate, which is required to review and approve it, with sufficient data for it to carry out the function that the statute anticipates will be accomplished by that body. I believe that the Board failed to do so here. The Board had the burden of proof and had to demonstrate by a preponderance of the credible evidence that it complied with the statutory requirements. From the evidence before me I **FIND** that the Board's burden was not met by it in this matter. Indeed, although the Board voted on January 21, 1985, to adopt a capital outlay amount of $461,900, no formal resolution to that effect appears in the record.

Normally, of course, the budget shoe is "on the other foot." There is, for example, substantial decisional authority from the Commissioner and the courts involving

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the restoration of budget monies resulting from the failure of the governing body to articulate its reasons for reductions. See, e.g., Bd. of Ed. of Fairview v. The Mayor and Council of Fairview, 1982 S.L.D. — (dec'd Feb. 3, 1982); Bd. of Ed. of Pompton Lakes v. The Mayor and Council of Pompton Lakes, 1980 S.L.D. — (dec'd, May 12, 1980); Bd. of Ed. of Dunellen v. Mayor and Council of Dunellen, 1974 S.L.D. 64; see generally, Bd. of Ed. of East Brunswick Twp. v. Twp. Council, East Brunswick, 48 N.J. 94 (1966). In this case, however, the evidence and the testimony before me reveals that the Board of School Estimate could not possibly have made an informed decision and specifically articulated its reasons for rejection of the capital outlay proposal in view of the fact that the Board itself, was likely not even aware of why it was recommending the specific amount that it did.

It may be that the Board has a real need for the repair work to be done. However, unless the Board clearly and specifically reveals its need to the Board of School Estimate, so that a determination at the constitutional level ("thorough and efficient") is able to be made, it is not appropriate to grant the Board the relief it is seeking. In this case, all that the Board did was to provide the Board of School Estimate with a lump sum -without any specific breakdown of components either by way of resolution, explanatory statement or otherwise. That failure is statutorily improper and on that ground alone, the petition should be **DISMISSED.**

However, in the event the Commissioner determines to reject or modify my determination, so as to require an examination into the specifics produced at the hearing, I now will address the issue that was identified in the Prehearing Order.

Both Pelosi and, to a lesser extent, Goas, made reference to the particular components of the $461,900 figure during the course of the hearing. Much attention was also devoted, both at the hearing and in the posthearing briefs filed by the parties, to the question of whether all or most of the items identified as needing correction were simply

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"repairs," which should have been included in a current expense line item and not allocated to capital outlay. There appears to be a dearth of decisional authority which clarifies what projects are exclusively to be allocated to capital outlay, as opposed to current expense. As respondents note, N.J.S.A. 18A:21-1 does provide some guidance since it lists those capital projects which a Board may undertake and pay for either through taxes or by the issuance of bonds. In relevant part, the statute includes: "the . . . reconstruction, remodeling, alteration . . . or major repair of buildings," and the "purchase of the original furniture, equipment and apparatus, or major renewals of furniture, equipment and apparatus. . . ." See, N.J.S.A. 18A:21-1(3) and (4). Thus, it would appear, at the very least, that the work must be of a "major" nature. According to the respondents, mere "repairs" should be made a part of a current expense budget, unless they are of a particularly substantial nature such as those which enlarge a schoolhouse, and that none of the items involved in this case fall into that category.

On balance, the mere attachment of a label, such as "major" repair, or "enlargement," does not provide much assistance. However, some of the items included in the list in this case are readily identifiable as those of a capital outlay nature. The replacement of lockers, which I assume are built-in, would be an item that properly should be characterized as a capital project. I also believe that the need to replace the pump and service traps at the Oakwood School is of a capital nature. So, too, the elimination of some existing stands at the stadium, and the cleaning and repainting of the steel structure together with installation of new aluminum seat, foot and walkway boards, would be a capital project type of undertaking. I also believe that replacement of floors fall into that category as well.

However, whether or not any one or more of the items falls into the category of a "repair," as opposed to a "capital" category, is not important in the particular circumstances of this case. A more significant point is that the Board failed to demonstrate that any one or more of the proposed projects are necessary in order for it to

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provide a "thorough and efficient system" of free public education. While both Pelosi and Goas testified regarding the need for the work to be done, and their own independent conclusions that safety of students and the public were endangered, neither that testimony nor the photographs or other evidence was sufficient to support the claims. Certainly, school roofs, sidewalks, floors, etc., should be maintained and, where necessary, repaired or replaced. So, too, lockers in poor and deteriorating condition should either be fixed or replaced. However, the Board failed to demonstrate by a preponderance of the credible evidence that any of the items on its list had to be done in order for the Board to meet the constitutional obligation placed upon it. Indeed, the proposed expenditure of about $170,000 for work at the stadium, field house and maintenance building, seems to me to involve items that are well beyond the pale of constitutional expectation. The same may be said of the $120,000 expenditure for repair of the exterior of the Orange Middle School. No one disputes that the work ought to be done and unless it is, the situation will get worse. However, neither Pelosi nor Goas provided a sufficient foundation for me to conclude that unless such work was done the Board would not be able to provide what the State Constitution insists it provide.

I sense that the real problem in this case arises out of what I believe to be an inability on the part of the Board and the municipal governing body, through the Board of School Estimate, to communicate with one another adequately about a school plant situation which will get worse. Both sides, I am sure, are sincerely interested in improving Orange's school facilities. If that be the case, it seems to me that a proper effort can and should be undertaken by all concerned to see that this is accomplished. However, if litigation must take place to resolve the situation, then the Board must demonstrate that the burden placed upon it has been met. It failed to do so here. Based upon the evidence before me, I **FIND** that the determination of the respondents to delete the Board's proposed capital outlay of $461,900 in its 1985-86 budget was not arbitrary, capricious, unreasonable or otherwise in violation of law. I, therefore, **CONCLUDE** that the elimination by respondents of that sum from the petitioner's 1985-86 budget was, for the reasons stated herein, proper.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if **Saul Cooperman** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 10, 1986
DATE

Stephen G. Weiss
STEPHEN G. WEISS, ALJ

FEB 14 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 18 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE SCHOOL DISTRICT OF THE CITY OF ORANGE TOWNSHIP,	:	COMMISSIONER OF EDUCATION
PETITIONER,	:	DECISION
V.	:	
BOARD OF SCHOOL ESTIMATE AND CITY COUNCIL OF THE CITY OF ORANGE TOWNSHIP, ESSEX COUNTY,	:	
RESPONDENTS.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision have been filed with the Commissioner in accordance with the provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board's exceptions aver that the ALJ erred in the following manner:

1. The ALJ should have set aside the budgetary reduction because the governing body failed to articulate reasons for the capital outlay reduction.

2. The ALJ determined that the Board did not comply with the statutory provisions of N.J.S.A. 18A:22-18.

3. The ALJ determined that the budget fixed by the governing body was sufficient to provide a "thorough and efficient" school system.

Relying, inter alia, on Board of Education of East Brunswick v. Township Council of East Brunswick, 48 N.J. 94 (1966), the Board argues that a lump sum reduction from a school budget such as that made by the Board of School Estimate herein in the amount of $461,900, without a governing body's knowing, identifying, and setting forth specific line items of the budget and giving supporting reasons therefor at the time of such reduction, is per se an arbitrary, capricious, and unreasonable act. (Board's Exceptions, at pp. 2-3) It is the Board's position that it submitted the budget pursuant to law and on the required form of the State Department of Education. It refers the Commissioner to P-2 in evidence for support of this proposition. Furthermore, the Board

argues, if the governing body did not have sufficient information, then it had an obligation and fiduciary duty to request same. The Board again cites East Brunswick, supra, for this proposition.

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The Board further avows that the procedures set forth under N.J.S.A. 18A:22-18 are used when capital needs are determined after the local district's budget has been set. On the other hand, the Board contends, the procedure of N.J.S.A. 18A:22-8 is used when the local school district is making a capital outlay request which is included in its annual budget. The Board avers that the members of the Board of School Estimate did receive a statement of capital needs which was in the annual budget adopted by the Board of Education. It is further submitted by the Board that a separate resolution, as urged by the ALJ, is unnecessary. It is the Board's position that the Board of School Estimate and the governing body arbitrarily and without reason eliminated the requested need of the Board of Education. The Board further avers it did not violate the requisite procedures in establishing its budget for the 1985-86 school year.

The Board's third argument relies on the testimony at the hearing for the proposition that the Board, through its witnesses, Messrs. Pelosi, the Business Administrator, and Goas, the architect who performed the recent facilities study, presented demonstrable and unrefutable evidence of facility needs. The Board challenges the governing body's contention that it does not need the amount requested in the capital outlay portion of its budget. The Board argues that "the governing body did not produce any witness, evidence or statement of reasons why or how the Board could operate a thorough and efficient system in the absence of the requested amount." (Board's Exceptions, at p. 7) The Board submits that the Orange Township Board has made a prima facie case of the critical condition of its facilities. It also established, the Board argues in exceptions, that there is a need to address the problems in order to provide a thorough and efficient system of education for its pupils. The Board states in summary that the initial decision ignored certain "time tested judicial and Commissioner decisions regarding budget procedures and appeals. Certainly to allow the decision of the Administrative Law Judge to stand would erase judicial case law and precedent established by the Commissioner of Education." (Board's Exceptions, at p. 8)

Having reviewed the record before him, as well as the exceptions filed by the Board, the Commissioner is convinced that the Board failed in its duty to properly prepare its budget in compliance with N.J.S.A. 18A:22-8 and The Chart of Accounts issued by the State Department of Education. For the reasons set forth below, the Commissioner agrees with the ALJ that under the circumstances the elimination by respondents of a sum in the amount of $461,900 designated in the budget as "capital outlay" was not arbitrary, capricious, unreasonable or otherwise in violation of the law.

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In the absence of a complete set of transcripts in this matter, the Commissioner initially notes from the initial decision that the only item sent by the Board to the Board of School Estimate in connection with the proposed budget was the budget document itself, P-2. (Initial Decision, ante) The Commissioner takes notice of the fact that the Maintenance Department Requests, P-3, did not accompany the budget submitted to the Board of School Estimate, but rather was introduced during the hearing before the ALJ. Witness Pelosi, the Board Secretary/Business Administrator, it is noted, testified that P-3 represents a list of expenditures totaling $461,900, that "had been culled from a longer list of such items which was contained in a facilities study prepared by E.I. Associates***." (Id., ante) It included specific expenditures that the Board hoped to make with the money earmarked for Capital Outlay. (Id., ante) Witness Pelosi, it is further noted from the initial decision, termed these expenditures as "particularly pressing needs, which he said involved pupil and public safety***." (Id., ante)

Finally, the Commissioner takes notice of the following language in the Foreword of The Chart of Accounts, a document issued to all New Jersey public school districts. "The purpose of this Handbook is to provide a guide to school officials on financial coding of accounts in New Jersey school financial operations." This handbook complements N.J.S.A. 18A:22-9 Categories of expenditures; fixing and N.J.S.A. 18A:22-8 Contents of budget.

His careful review reveals to the Commissioner that none of the items included in the lump sum totaling $461,900 are, according to The Chart of Accounts, capital outlay. Under the 1200 Series, "Capital Outlay" expenditures include those items which

> ***result in the acquisition of fixed assets or additions to fixed assets. They are expenditures for land or existing buildings, improvements of grounds, construction of buildings, additions to buildings, remodeling of buildings, or built-in equipment.
>
> ***
>
> New and additional movable equipment and furniture are recorded here when authorized as a capital improvement project. Also expenditures for library books for a new school library, and material accessions involving an expansion of the school library may be recorded.***
>
> (emphasis in text)
>
> (The Chart of Accounts, at p. 23)

See also N.J.S.A. 18A:21-1 Capital projects; description.

Rather, the items listed in P-3, which total $461,900, are mere repairs as suggested in The Chart of Accounts under the 700 Series. "Maintenance of Plant" expenditures consist of those activities which

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> are concerned with keeping the grounds, buildings and equipment at their original condition of completeness or efficiency, either through repairs or by replacement of property.
>
> Concerning equipment, expenditures for repairs and piece-for-piece replacements are recorded under MAINTENANCE OF PLANT regardless of the relative value of the replaced item or equipment and its replacement. By piece-for-piece replacement is meant the replacement of a complete unit of equipment serving the same purpose in the same way. For example, if a manual typewriter was replaced by an electric typewriter, the entire cost of the electric typewriter would be recorded under MAINTENANCE OF PLANT.
>
> ***
>
> Expenditures for the initial or additional purchase of movable instructional equipment and furniture are to be recorded under this account.
>
> Movable equipment may still be purchased under improvement authorizations with or without mortgage.
>
> Expenditures for repairs and replacements of service systems and other built-in equipment are recorded under MAINTENANCE OF PLANT as repairs to buildings. Expenditures for the initial installation and extension of services, systems and other built-in equipment in existing buildings and recorded under the 1200 Series, CAPITAL OUTLAY, as remodeling.
>
> Expenditures for repairs to building structures which do not add to existing facilities are recorded under MAINTENANCE OF PLANT. As a general guide, if changes of partitions, roof structures, or walls are not involved, the expenditures are recorded under MAINTENANCE OF PLANT: if such changes are involved, the expenditures are recorded under the 1200 Series, CAPITAL OUTLAY, as remodeling.

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> Expenditures for repairs to grounds and repairs and replacements of fixtures built into grounds are recorded under MAINTENANCE OF PLANT. Expenditures for improvements to grounds are recorded under the 1200 Series, CAPITAL OUTLAY.
>
> (emphasis in text)
>
> (The Chart of Accounts, at pp. 15-16)

The budget presented to the Board of School Estimate should have reflected each item listed in P-3, and its cost, under the 700 Series, as part of Expenditure Accounts, not as a lump sum figure made part of the 1200 Series, Capital Outlay. Since the Board improperly placed these items in the budget and failed to specify other than a total sum figure, the Commissioner is in accord with the conclusion of the ALJ in this matter, notwithstanding the ALJ's charitable but mistaken effort to group some of the items in P-3 among Capital Outlay expenses. The initial decision found and the Commissioner adopts the conclusion that

> ***the Board failed to demonstrate that any one or more of the proposed projects are necessary in order for it to provide a "thorough and efficient system" of free public education.*** [T]he Board failed to demonstrate by a preponderance of the credible evidence that any of the items on its list had to be done in order for the Board to meet the constitutional obligation placed upon it. *** [N]either Pelosi nor Goas provided a sufficient foundation for me to conclude that unless such work was done the Board would not be able to provide what the State Constitution insists it provide. (emphasis in text)
>
> (ante)

Notwithstanding the conclusion that the Board was remiss in failing to properly categorize the items needing repair in the budget and its improperly labeling the expenditure, the Commissioner is aware of the very serious deterioration in the schools of Orange Township and is aware of the fact that these items are among those items mentioned in the Board's Long-Range Improvement Plan. The Commissioner directs that if the Board deems such repairs to be essential to carrying out its Long-Range Improvement Plan within the 1985-86 school budget year, it shall seek the amount necessary for the completion of such replacements and repairs from the Board of School Estimate. If such amount deemed to be essential should exceed the budget cap for the 1985-86 school year, the Board may request from the Commissioner a midyear cap waiver.

Accordingly, the Commissioner adopts with modification the initial decision for the reasons expressed herein.

IT IS SO ORDERED.

March 31, 1986 COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2494-84
EDU 1563-84
(CONSOLIDATED)
AGENCY DKT. NOS. 66-4/84
18-1/84

PETER B. CONTINI,
Petitioner,
v.
BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, GLOUCESTER COUNTY;
BOARD OF EDUCATION OF THE TOWNSHIP OF FRANKLIN, GLOUCESTER COUNTY;
BOARD OF EDUCATION OF THE TOWNSHIP OF ELK, GLOUCESTER COUNTY,
Respondents.
and,
IN THE MATTER OF THE APPLICATION FOR AN ORDER MANDATING ISSUANCE OF SCHOOL BONDS FOR A CAPITAL PROJECT TO CONSTRUCT A MIDDLE SCHOOL OF THE BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT.

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Regina Murray, Deputy Attorney General, representing Peter B. Contini, Gloucester County Superintendent of Schools (Irwin I. Kimmelman, Attorney General of New Jersey, attorney)

Mark D. Schorr, Esq., representing the Board of Education of the Southern Gloucester County Regional School District (Sterns, Herbert & Weinroth, attorneys)

B. Michael Borelli, Esq., representing the Board of Education of the Township of Franklin (Bullock & Borelli, attorneys)

Wayne C. Streitz, Esq., representing the Board of Education of Elk Township (Streitz & Streitz, attorneys)

Joseph Hoffman, Esq., representing Township Council of the Township of Franklin (Hoffman, DiMuzio & Hoffman, attorneys)

Eugene P. Chell, Esq., representing Township Council of Elk Township

Record Closed: October 25, 1985 Decided: December 17, 1985

BEFORE **AUGUST E. THOMAS, ALJ:**

Peter B. Contini v. Board of Education of the Southern Gloucester Regional High School District, OAL DKT. EDU 2494-84 has been consolidated by consent of all parties with IN THE MATTER OF AN APPLICATION FOR AN ORDER MANDATING ISSUANCE OF SCHOOL BONDS FOR A CAPITAL PROJECT TO CONSTRUCT A MIDDLE SCHOOL OF THE BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT, OAL DKT. EDU 1563-84. These matters concern the charge by Peter B. Contini, who is the Gloucester County Superintendent of Schools, that the Southern Gloucester County Regional School District Board of Education (Delsea) take an affirmative action to end the overcrowding in its school district. Similarly, Delsea implores the Commissioner to impose his broad powers under the New Jersey Constitution and to end the overcrowding in the Delsea School District.

These matters were transferred to the Office of Administrative Law as contested cases, pursuant to N.J.S.A. 52:14F-1 et seq., and following prehearing conferences between the parties, hearings were conducted on eight days during fall 1984. A ninth day of hearing was held on June 3, 1985. The first seven hearings were

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conducted in the Camden County Hall of Justice, Camden; the eighth and ninth hearings were conducted respectively, in the Haddonfield Borough Municipal Building, Haddonfield and the Woodlynne Municipal Building, Woodlynne.

At the end of the seventh day of hearing on November 16, 1984, at which time most of the testimony had been considered and practically all of the documents relied upon were admitted in evidence, a motion was granted that the parties be advised to discuss this matter formally in an attempt at settlement. On the eighth day of hearing on December 13, 1984, I was advised that the parties were unable to settle the matter. I was also advised that both the Elk Township Board of Education and the Franklin Township Board of Education had passed resolutions seeking a deregionalization study to be performed by the Commissioner of Education; therefore, all counsel consented that the Initial Decision in this matter be withheld pending the deregionalization study and a subsequent continued hearing pursuant to the deregionalization statutes codified at N.J.S.A. 18A:13-51 et seq.

Further, motion to hold these matters in abeyance was GRANTED orally and committed to writing on December 21, 1984. These matters were placed on inactive status for six months by Order dated January 2, 1985. The ninth, and last hearing, was held on June 3, 1985.

Delsea and the county superintendent submitted Briefs including proposed findings of fact and conclusions of law following the hearing. The Franklin Board, Franklin Township and the Elk Township Board filed answering letter briefs. Elk Township relies on the letter brief filed by the Elk Township Board. Delsea filed a letter reply brief on October 25, 1985, at which time this record was closed. Later the litigants agreed to an extension of time for submission of the Initial Decision to December 31, 1985.

THE LITIGANTS

There are six litigants to the within controversy. In order to assist in the understanding of their respective positions, their relationship to the controversy is set forth as follows:

1. Peter B. Contini is the County Superintendent of Schools and the Commissioner's representative in Gloucester County.

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The county superintendent exercises general supervision over all of the schools in Gloucester County in accordance with the rules prescribed by the State Board of Education (N.J.S.A. 18A:7-8).

2. Delsea is a limited purpose regional school incorporating grades 7 - 12. The school educates pupils from Franklin and Elk Townships. It has its own board of education.

3. Franklin Township has its own board of education responsible for educating its pupils in Franklin's K - 6 elementary school system. These pupils go on to Delsea.

4. The Franklin Township governing body is ultimately responsible, through taxation, for financing the education of its K - 6 pupils in Franklin as well as financing its share of the education of its 7 - 12 pupils attending Delsea.

5. Elk Township has its own board of education responsible for educating its pupils in Elk Township's K - 6 elementary school systems. These pupils go on to Delsea.

6. The Elk Township governing body is ultimately responsible, through taxation, for financing the education of its K - 6 pupils in Elk Township as well as its 7 - 12 pupils attending Delsea.

The exhibits in this discussion are marked as follows:

D = Delsea Regional High School District
C = County Superintendent (Gloucester)
F = Franklin Township Board of Education
E = Elk Township Board of Education

PROCEDURAL HISTORY INCLUDING STATEMENTS OF FACTS

The salient facts in this matter are not in dispute. This litigation concerns a long-term solution to the problem of inadequate facilities in the Delsea school district.

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The Delsea school district is organized as a limited purpose, Type II, regional school district serving grades 7 through 12. It is comprised of two constituent districts: the Elk Township and Franklin Township School Districts. Delsea Regional High School was opened in the 1960-61 school year with approximately 1,050 pupils (C-10, at 5). The original functional capacity of the school was also 1,050. The pupil population increased so that by the 1968-69 school year, there was a pupil enrollment of approximately 1,375, resulting in the imposition of double sessions to resolve the overcrowded conditions of a regular single session program (C-10 at 5). In 1973, seven rooms were added to the high school building with the use of funds from a State grant.[1] Nevertheless, double sessions were not eliminated.

In 1968, when double sessions were introduced in Delsea, grades 9 through 12 attended the morning session and grades 7 and 8 were scheduled for the afternoons. In the 1974-75 school year, this structure was changed so the grades 10 through 12 attended in the morning and grades 7 through 9 attended in the afternoon. In the 1984-85 school year, Delsea's population had grown to 1,464. Delsea's structure was again altered, with 9th through 12th graders attending school in the morning and 7th and 8th graders attending in the afternoons with a one-period overlap. The morning session currently runs from 7:25 a.m. and continues to 1:15 p.m.; the afternoon session begins at 12:15 p.m. and ends at 5:30 p.m. This schedule allows for a one-period expansion of the morning session. Of the 1,464 pupils in the school, approximately 500 attend in the afternoon and the remainder attend in the morning.

On April 2, 1974, Delsea placed its first bond referendum before the voters for approval of an approximately $3 million capital construction project for 10 additional classrooms, a gymnasium and a 34-room middle school. Between April 2, 1974 and December 19, 1983, Delsea placed seven referenda before the voters for projects that were similar to the initial one or somewhat scaled down versions to make them more palatable to the voters. In the interim, Delsea Board and administration members explored other ways of solving the problem, such as the possibility of leasing or refurbishing other buildings in the community or in receiving federal assistance. All referenda were defeated, the last one on December 19, 1983, by a margin of 1,574 to 946 (D-2).

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[1] There was no local tax assessment for this building program.

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This matter was instituted on January 12, 1984, when Delsea filed a Petition of Appeal before the Commissioner (OAL DKT. EDU 1536-84) seeking an order "directing the issuance of bonds in an amount sufficient to construct a middle school." This request was based upon the district's inability to provide a thorough and efficient education to its students because of overcrowding and 17 continuous years of double sessions. The Petition of Appeal was filed because of Delsea's long-stated desire to end double sessions and its frustration over its inability to do so. On March 29, 1984, the Gloucester County Superintendent of Schools, filed a cross Petition of Appeal requesting that the Commissioner exercise his remedial powers pursuant to N.J.S.A. 18A:7A-14 to order the Boards of Education of Delsea and of the Townships of Franklin and Elk to show cause why the Commissioner should not order "either alternatively or in any combination" any of the following:

- a study as to the feasibility of dissolving the regional school district;
- a study as to the feasibility of creating new sending-receiving relationships among the above boards or with other boards of education in the general geographic region;
- a facilities need study to determine the extent to which the existing facility of Delsea must be enlarged or augmented to relieve the present overcrowding, the estimated cost thereof and the impact an order directing the issuance of bonds in that amount would have on the municipalities' debt limitation;
- the completion of an updated enrollment project by Delsea, the Elk Township School District and the Franklin Township School District;
- a directive that respondents pay for the costs of the above studies and the services of any expert needed to perform the above tasks and that they provide cooperation and support to the parties conducting the above studies; and
- any other just and necessary relief.

The parties to Peter B. Contini v. Board of Education of the Southern Gloucester County Regional School District, OAL DKT. EDU 2494-84, signed a partial consent order authorizing the county superintendent to commence a study as to the feasibility of dissolving the regional school district and to the feasibility of creating new

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sending-receiving relationships among boards of education in that geographic region. On June 7, 1984, the partial consent order was approved by the undersigned administrative law judge (ALJ).

By letter dated June 15, 1984, Peter B. Contini informed Delsea's superintendent and board secretary of his recommendation to the Commissioner that Delsea not be certified (D-5). This notification was made pursuant to the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., and the Manual for Evaluation of Local School Districts (D-10). The recommendation to the Commissioner was based upon the findings of the Department of Education monitoring team, which resulted in unacceptable ratings of the following elements and indicators:

> Element 5 - Facilities
>
> Indicator 5.3 - The district has a board-approved plan to upgrade or eliminate all substandard classrooms.
>
> Indicator 5.4 - The district's long-range facilities plan has been reviewed/revised within the last five years. [D-]

With regard to Indicator 5.4, the findings relating to the requirement for a "safe facility to carry out the education program" were as follows:

> The school district has conducted 16[2] continuous years of double session [sic] beginning in 1968 due to the lack of adequate school facilities. During this period of time, seven bond referenda have been presented to the voters in an attempt to alleviate the facility needs of the district. In each instance the referendum was rejected by voters, creating the need to continue double session schedules. Despite the existence of an approved long-range facilities plan, the district has been unable to implement any plan to correct their inability to provide adequate facilities. Presently, this matter has been brought before the Commissioner of Education in order to seek a permanent resolution to the lack of adequate school facilities. [D-5]

The recommendation to the district was as follows:

> The district should cooperate in the studies required by the Consent Order in Peter B. Contini v. Board of Education of the Southern Gloucester County Regional School District, et al., OAL DKT. EDU 2494-84, which will be instrumental in the long term solution of the inadequate facility matter. [D-5]

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[2] The 1985-86 school year is the eighteenth continuous year of double sessions.

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Prior to a second prehearing conference on September 26, 1984, the feasibility study completed pursuant to the terms of a Partial Consent Order was issued to the parties (C-2). On April 2, 1985, the Report of the County Superintendent of Schools on the Advisability of the Withdrawal of Elk Township and Franklin Township from the Southern Gloucester County Regional High School District was issued (C-10). On July 29, 1985, a meeting of committees of the school boards and municipal bodies party to this action and their counsel was held at the Office of the county superintendent. The meeting was called by the attorney for Franklin Township for the stated purpose of having the committees present their views as to the best solution to the educational problems faced by the school districts and the municipalities represented. Although the school districts and the municipal governing bodies have agreed to continue meeting in order to possibly work out a settlement to this controversy, no application has been filed to stay these proceedings in OAL.

No solution to Delsea's problem has been implemented. Delsea seeks an order from the Commissioner mandating the issuance of bonds to construct a new middle school, which it asserts is the only acceptable solution to the dilemma facing the citizens of the district and the state.

The Franklin and Elk Boards seek dissolution of the regional district. Franklin Township urges further studies and exploration of other alternatives which may be more efficient and cost-effective.

Given this procedural history in which some of the factual elements leading to this controversy are set forth, I hereby adopt the factual statements incorporated above as FINDINGS OF FACT.

DISCUSSION

I

The New Jersey Constitution places upon the Legislature the responsibility to "provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State. . ." N.J. Const., Art. VIII, § IV, par. 1 (1947). In turn, the Legislature has delegated this duty to a combination of state and local authorities. The Department of Education is charged with the "general

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supervision and control of public education in this state." N.J.S.A. 18A:4-1, 18A:4-10. The Department consists of the State Board of Education, which is the "head of the department," the Commissioner of Education and various divisions, bureaus, branches, committees, officers and employees. N.J.S.A. 18A:4-1. The Commissioner is the chief executive and administrative officer of the department and is responsible for the supervision of all schools aided through state appropriations. N.J.S.A. 18A:4-22, 18A:4-23.[3] The Commissioner has the statutory duty to "inquire into and ascertain the thoroughness and efficiency of operation" of public schools. N.J.S.A. 18A:4-24. It is his "affirmative obligation to see to it that the statutory objectives are met" and that local school boards and governing bodies meet their delegated duties. In re Upper Freehold Regional School District, 86 N.J. 265, 273 (1981); Robinson v. Cahill, 62 N.J. 473, 509, n. 9 (1973); Parsippany-Troy Hills Education Association v. Board of Education, 188 N.J. Super. 161, 165-66 (App. Div. 1983).

The Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq., was enacted to meet the constitutional mandate for the maintenance and support of a thorough and efficient system of free public schools. N.J.S.A. 18A:7A-2. The Legislature recognized that "the sufficiency of education is a growing and evolving concept" and that the state should provide for free public schools in a manner "which guarantees and encourages local participation consistent with the goal of a thorough and efficient system. . ." N.J.S.A. 18A:7A-2(4) and (5). Thus, general guidelines for the achievement of the legislative goal are included in the 1975 Act. N.J.S.A. 18A:7A-5. First, the Legislature has stated its preference for local involvement in defining and achieving "thorough and efficient," N.J.S.A. 18A:7A-2(5), and has thus included as an element of "thorough and efficient" the "[e]stablishment of educational goals at both the State and local levels" and the "[e]ncouragement of public involvement in the establishment of educational goals." N.J.S.A. 18A:7A-5(a) and (b). Other elements of the definition include instruction "intended to produce the attainment of reasonable levels of proficiency" in the basic skills, N.J.S.A. 18A:7A-5(c); a "breadth of program offerings," N.J.S.A. 18A:7A-5(d); programs and services for students with special educational needs,

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[3] See Basic School Law, New Jersey School Boards Association, Vol. 1, c. 1984, The Flow of Authority to Educate, pp. 1-18, for an excellent summary of New Jersey's educational process.

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N.J.S.A. 18A:7A-5(e); qualified personnel, N.J.S.A. 18A:7A-5(g); efficient administrative procedures N.J.S.A. 18A:7A-5(h); an adequate state program of research and development, N.J.S.A. 18A:7A-5(i); and state and local programs for evaluation and monitoring, N.J.S.A. 18A:7A-5(j).

Most significant to the current action is the legislative statement that "adequately equipped, sanitary and secure physical facilities. . ." are necessary to meet the constitutional mandate. N.J.S.A. 18A:7A-5(f). Even prior to the enactment of the 1975 Act, the New Jersey Supreme Court recognized that thorough and efficient education necessarily includes the provision of adequate physical facilities. Board of Education of Elizabeth v. City Council of Elizabeth, 55 N.J 501, 506 (1970); In re Upper Freehold Regional School District.

The Department of Education has interpreted the legislative and judicial requirement of "adequate physical facilities" to preclude the use of "split" or "double" sessions as a method of remedying an overcrowded school situation. See, Central Regional Education Association et al. v. Board of Education of the Central Regional High School District, Ocean County, 1977 S.L.D. 543; Wassmer v. Board of Education of the Borough of Wharton, Morris County, 1967 S.L.D. 125, 127-128. As was emphasized in Board of Education of the Borough of Bradley Beach v. Board of Education of the City of Asbury Park, 1959-60 S.L.D. 159 at 162-163:

> [T]he Commissioner is convinced that double sessions cannot be considered an adequate substitute under any circumstances for the complete educational program possible in a normal school day and can only be defended under emergency conditions. Because of the deprivation of full educational opportunities for pupils, of inadequate expedients which must be employed, of the unnatural stresses and strains through inconvenience which are placed on pupils, homes and staff, the Commissioner deplores the necessity to resort to a double session organization.

Thus, only under unusual or emergency conditions would the use of split sessions be condoned, and in those instances, only for a limited period of time. Id.; Wassmer.

The Department of Education policy against double sessions, as violative of the thorough and efficient requirement, is further reflected in the current certification process. Pursuant to statute, the County Superintendent of Schools for each county is

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charged with monitoring the condition of school facilities in the local districts under his general supervision to insure that the local districts are meeting their "thorough and efficient" obligations. N.J.S.A. 18A:7-8; N.J.S.A.18A:7A-5. State Board of Education regulations set forth an evaluation and certification system pursuant to which the county superintendent examines ten essential elements of the educational process, including a facilities element. N.J.A.C. 6:8-6.2(5). This facilities component is included as part of the monitoring process in recognition that a school district which is not able to provide adequate facilities for its students is not meeting its obligation. N.J.S.A. 18A:7A-5; N.J.A.C. 6:8-4.8(b) (requiring that "[e]ach school building and site shall provide suitable accommodations to carry out the educational program of the school. . ."). The Department of Education's Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975 requires that a school district's long-range facilities plan undergo a review and revision process as part of the monitoring evaluation for certification. And under its Guidebook for the Manual for the Evaluation of Local School Districts Pursuant to the Public School Education Act of 1975, a school district on split session is considered not to have implemented its long-range facilities plan and thus cannot be recommended for certification.

A school district operating a split session schedule lacks adequate facilities to afford all its students a normal school day. Therefore, such a school is not meeting its legislative obligation to provide a thorough and efficient education to its students, as interpreted by the Commissioner and State Board of Education. The Appellate Division has recently confirmed the reasonableness of the department's interpretation of the "adequate facilities" element to preclude the use of double sessions in all except the most extreme circumstances. In C.D. v. Board of Education of the Lenape Regional High School District, 1984 S.L.D. ____ (decided by the Commissioner August 24, 1984), aff'd., State Board of Education, May 1, 1985, aff'd, New Jersey Superior Court (N.J. App. Div. Aug. 19, 1985, A-4358-84T5), the court held that, in light of its "statewide statutory responsibilities for a thorough and efficient system of public schools" the State Board had the right to impose educational standards and affirmed that agency's decision "to prevent the educational disadvantages inherent in split-session scheduling." In that case, the Commissioner and the State Board had reviewed the Lenape Board of Education's decision to implement a staggered session plan which would have been in effect for four years and would only affect ninth graders during that period of time. The Commissioner ordered that the staggered sessions be eliminated, and he noted that under monitoring procedures,

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a school on split sessions would not be recommended for certification. Concluding that "split sessions preclude the provision of a thorough and efficient education which is constitutionally and statutorily mandated," the State Board declined to permit the implementation of the local district's plan and ordered redistricting to remedy the overcrowding problem.

Thus, the legislative mandate of thorough and efficient has been interpreted to preclude a school district's use of split or double sessions as a method of dealing with an overcrowding problem. Districts on such a schedule do not possess adequate facilities to provide their entire student population with a normal school day.

In Delsea, the double sessions schedule not only prevents the district from complying with the "adequate facilities" component of N.J.S.A. 18A:7A-5, but also prevents it from meeting its goals and objectives established pursuant to N.J.S.A. 18A:7A-5(a). The space and scheduling restrictions resulting from double sessions curtails the attainment of many of Delsea's "Educational Outcome Goals" (D-12) and its "Educational Process Goals" (D-13).

The extensive testimony demonstrated that deficiencies exist, due virtually solely to the double sessions, in all aspects of the school program, and examples follow:

1. Instructional Time

Delsea's double sessions have necessitated the scheduling of 7 class periods of 40 minutes each for grades 9 through 12 and six class periods for grades 7 and 8,[4] which equates to 20 hours of pupil-teacher contact time per week and 720 hours for one school year. Over a four-year period, Delsea students are therefore deprived of up to 900 hours of instructional time that would be offered to them on a single session (D-10, at 10). By contrast, when children attended single sessions, classes were up to 48 minutes long. The reduction in class time precludes coverage of a satisfactory number of topics in any course and impacts adversely on the ability of the teacher to do follow-up work.

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[4] Prior to the implementation of staggered sessions in 1984-85, all grades attended for six periods.

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2. Breadth of Course Offerings

The seven period session negates the possibility of offering as broad and varied a curriculum as the Board would like. Programs are severely limited to basic and traditional courses (D-10, at 14). Because of the double sessions a variety of language courses (German, Spanish and Latin), courses such as world geography and a better selection of shops cannot be offered.

3. Electives

Split sessions limit the number of electives that can be offered to generally two per year. Again, the reason is the constricted schedule and the inability to offer the courses because of the concentration on the basic subjects.

4. Teaching Staff

Fully 42 percent of teachers "float" — that is, they move from room to room during their school day. This presents problems in connection with classroom displays and the availability of materials and makes for numerous other disadvantages which attend the absence of a teaching base (D-10, at 8).

Because the staff is necessarily divided into two groups — 57 who work in the morning session, from 7:30 a.m. until 1:20 p.m., and the 27 who work in the afternoon, from 11:46 a.m. to 5:30 p.m. — communication is made difficult. There is little chance for staff interaction, and two faculty meetings on the very same agenda are needed. There are also problems with curriculum for the same reason. The administration has to rely on in-service days to get the teachers together on such matters.

Aside from the regular responsibilities of six courses, faculty have homeroom, hall, cafeteria, parking lot and bus duties, on an average of one hour and 15 minutes per day. This inordinate amount of time away from teaching duties is caused by the split sessions.

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These are four examples demonstrating severe restrictions of the educational program. However, there are a number of other areas in which the testimony and the documentation demonstrated serious curtailment and other attendant problems with the educational program. They are enumerated as follows: laboratories; shops; teaching stations; special education; tutoring; extra-curricular activities; interscholastic sports; time for discipline, time for guidance; transportation; scheduling of study halls; library time; and auditorium, gymnasium and cafeteria constrictions, all caused by inadequate facilities. The details of these program shortcomings are set forth in the Delsea and Contini briefs.

A summary of the record demonstrates that Delsea's double sessions affect virtually every aspect of the educational process. In fact, there is no dispute between the litigants as to the disadvantages wrought by the inadequate facilities.

As noted above, the district has not been certified by the State Department of Education and cannot be until the double sessions are eliminated (D-5). Further, the district admittedly is unable to meet its educational outcome and educational process goals (D-12, D-13), especially insofar as it cannot offer programs that will enable students to acquire skills and knowledge in every phase of the curriculum and permit diverse forms of instruction. As stated earlier, these goals are mandated by State Board of Education regulation. See, N.J.A.C. 6:8-2.1; N.J.A.C. 6:8-3.1 et seq. Also, the administration and staff cannot fulfill their daily objectives in the ways enumerated above.

Finally, it should be noted in this context that the witnesses were unanimous in their conclusion that a thorough and efficient education is not being offered. John Falzetta, one of Delsea's experts, testified that the district missed the state mandate by a wide margin principally because of constricted course offerings, insufficient time on task and inability to use ancillary services. The county superintendent, after filing his report on the advisability of the proposed withdrawal (N.J.S.A. 18A:13-52), concluded in testimony on the very last day of the hearing that the condition of the facilities of the district constituted a violation of the thorough and efficient education requirement.

Based on the foregoing testimony and evidence, I **FIND** the following additional **FACTS:**

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1. Delsea has a functional capacity of 1,150 pupils.[5]

2. Delsea's pupil population in 1984-85 was 1,464.

3. Delsea is overcrowded because of insufficient and inadequate facilities.

4. Delsea is on a split session of scheduling for the eighteenth (18th) consecutive year.

5. Seven bonding referenda over the past years have failed; consequently, the problem of double sessions remains.

6. Seven rooms added to Delsea with a state grant in 1973 failed to end the double sessions.

7. Delsea is not certified nor is it certifiable because of its inadequate facilities.

8. Delsea cannot provide a thorough and efficient education for its pupils because of overcrowding and split sessions caused by inadequate facilities.

Accordingly, I **CONCLUDE** that Delsea is in violation of the New Jersey constitutional mandate to provide a thorough and efficient system of free public schools. This is so because of all of the failings in its curriculum and other program offerings, as set forth above, brought on by its insufficient and inadequate facilities.

REMEDY

The county superintendent and Delsea concur in their respective conclusions that the only viable remedy in this matter is an Order by the Commissioner directing the issuance of bonds in an amount sufficient to construct a middle school in the Delsea district.

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[5] Functional capacity is defined as 80 percent of the building's total capacity. (D-16, Table 27, p. 49) (See also p. 41).

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Conversely, the Elk and Franklin Boards of Education, which are the constituent districts of Delsea, assert that the most feasible and desirable solution to the problem is their withdrawal from the regional school district, resulting in its dissolution.

The Elk Board offered testimony of economic benefits of its withdrawal and the Franklin Board submitted studies demonstrating its facilities' problems (F-1, 2, 3, 4; E-1).

Elk Township asserts that its withdrawal will allow for a unified K-12 district in Franklin Township and will give Franklin the time it needs to solve its facilities problems on a K-12 basis. The Franklin Board of Education argues that Franklin Township (K-6) faces serious facility needs which will only be exacerbated by an Order directing the issuance of bonds for construction of a middle school for Delsea. The Franklin Board acknowledges the need for secondary facilities; however, Franklin urges the Commissioner to consider its facility needs which were not brought out as a result of the present litigation.

The Franklin Township governing body, while acknowledging the seriousness of Delsea's problem, states that the construction of a middle school is only a piecemeal approach to the facilities problems faced by the Elk and Franklin Boards of Education as well as the Delsea Board. Franklin Township points out that Franklin requires a building program even if the Delsea middle school is constructed. Consequently, Franklin Township urges that the Commissioner order further studies to consider other options, not fully explored, as having a potential of being the most effective and cost-efficient on a long-term basis.

Based on my review of this record, Franklin Township's suggestion for further studies must be rejected. There is a crisis in Delsea regarding its inadequate educational facility which has lasted for eighteen years, so far. During this time the litigants should have been able to resolve the problem. Further, settlement attempts during this current litigation (two years) have failed. There is no restriction on the litigants in continuing with their efforts to resolve the matter locally. However, time is running out, and, to date, no resolution of this problem has been reached.

Accordingly, only two solutions remain for consideration. They are:

(1) the issuance of bonds to construct a middle school in Delsea, or

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(2) the dissolution of Delsea resulting in a unified K-12 system in Franklin Township, and creating a sending-receiving relationship with Elk Township's 7-12 pupils going to Clearview Regional High School.

Regarding the latter, the county superintendent conducted a study pursuant to my Partial Consent Order on June 7, 1984, to explore the feasibility of dissolving Delsea and creating the aforementioned sending-receiving relationship. Both Elk and Franklin Townsip school districts were required to participate in that study because of the resultant impact on both if dissolution should occur (C-2). The county superintendent noted in the Educational Plan for Constituent Districts that if Delsea were dissolved,

> [b]ased on the enrollment date identified in Section II and the present condition of certain elementary buildings in Franklin Township, it is obvious that on a K-12 basis there would be the need to further study the overall educational facility needs of the district (C-2 at 36).

In that report, the county superintendent listed the advantages and disadvantages of dissolving the regional district and, irrespective of his acknowledgement of building needs in Franklin Township, concluded that it is feasible to dissolve Delsea and create the K-12 school districts of Elk and Franklin Townships. He also concluded that it is feasible for Franklin Township to offer a comprehensive K-12 educational program and for Elk Township to establish a sending-receiving relationship with Clearview Regional High School, finding it to be a contiguous district and geographically suitable (C-12 at 40-43). The feasibility study concluded that dissolution was a possible solution. However, the procedure for the dissolution process, invoked by both the Elk and Franklin Township Boards of Education in December 1984, did not follow, as it must, the statutory procedure for dissolving a regional school district N.J.S.A. 18A:13-51 et seq. These current matters were placed on an inactive status for six months so that this statutory procedure could be invoked. Nevertheless, neither district petitioned the Commissioner to submit the question of withdrawal to the electorate (N.J.S.A. 18A:13-54) after receiving the County Superintendent's Report on the Advisability of Deregionalization (C-10). In his Advisability Report (C-10), as distinguished from his earlier feasibility study (C-2), the county superintendent advised against the dissolution of Delsea. Although the Elk and Franklin Boards of Education could have requested that the question be submitted to the voters, neither district made such an application.

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At this juncture, the relief sought by the Elk and Franklin Township boards cannot be granted even if dissolution were found to be the best solution. In that event, my authority would be limited to a recommendation to the Commissioner to Order the districts to comply with the directives set forth in the deregionalization statutes (N.J.S.A. 18A:13-51 et seq.). Only after that process was invoked could deregionalization occur (Delsea's Brief, pp. 19-22).

Based on the above rationale and considering the facts disclosed at the hearings, I **CONCLUDE** that the most effective long-term solution to the problem of overcrowding at Delsea is an Order by the Commissioner directing the issuance of bonds to construct a middle school.

Two educational experts testified that deregionalization was not a sound solution for Delsea. Dr. Raymond Babineau, an expert in school facilities and demography, testified about the specific type of future growth expected in the area. He found that Gloucester County will experience a steady increase of the school-age population from the late 1980's to the mid 1990's. He made projections utilizing accepted demographic principles and concluded that Delsea will be 60 pupils over capacity in this current school year even without Elk pupils. His projections show a steady increase of pupils so that by the 1994-95 school year, the projected population of Franklin pupils alone will be 1,560. This figure is well above Delsea High School's functional capacity of 1,150 and also well above the present population, counting the Elk pupils. Dr. Babineau concluded that Delsea would have to return to double sessions by the year 1992 even if Elk pupils withdrew (D-16, Table 24 and Section III).

Dr. John Falzetta, a second educational expert, is a professor of education at Glassboro State College. His area of expertise is curriculum and instruction and administration (D-22). He testified that the most appropriate remedy in this case is the construction of a middle school. He gave several sound educational reasons for this statement and concluded that deregionalization would not only fail to remedy the overcrowding, it would create different programming problems for Delsea.

Based on the county superintendent's studies and his familiarity with the Delsea district, the county superintendent reached the conclusion that the reasonable solution would be the issuance of bonds to construct a middle school.

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None of the experts testified that dissolution of Delsea was a possible solution.

Based on all of the above, I **CONCLUDE** that the most appropriate remedy in this matter is the issuance of bonds by the Commissioner in an amount sufficient to construct a middle school. However, "[w]hen proceeding in the face of voter rejection, the Commissioner should exercise restraint in authorizing the issuance of bonds." (In re Upper Freehold Reg'l School Dist., 86 N.J. 265, 280 (1981)).

The architect's projected cost for this project is $8,621,108 if bid by June 1986 (D-28). There is no dispute between the litigants as to this projected cost. If the Commissioner accepts this recommendation, the $8,621,108 cost factor should first be subject to review and approval by the Bureau of Facility Planning of the State Department of Education.

It is further recommended that the Commissioner Order that a public hearing be conducted prior to his issuance of the Final Decision in this matter. The public hearing should take place before a different administrative law judge so that the focus of that testimony can be addressed to the remedy and not the reasons as to how and why the undersigned reached his Initial Decision.

It is also recommended that the Commissioner make this Initial Decision available prior to the public hearing so that interested persons will be better informed about the factual and procedural background of this case. In this way the public will be in a better position to effectively communicate its respective viewpoints to the Commissioner.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

17 December 85
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DEC 19 1985
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 20 1985
DATE

OFFICE OF ADMINISTRATIVE LAW

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PETER B. CONTINI,

PETITIONER,

V.

BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT ET AL., GLOUCESTER COUNTY,

RESPONDENTS.

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER MANDATING ISSUANCE OF SCHOOL BONDS FOR A CAPITAL PROJECT TO CONSTRUCT A MIDDLE SCHOOL OF THE BOARD OF EDUCATION OF THE SOUTHERN GLOUCESTER COUNTY REGIONAL SCHOOL DISTRICT.

COMMISSIONER OF EDUCATION

DECISION

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The Commissioner has reviewed the record in this matter as well as the recommended report and decision of the ALJ. The Commissioner notes that exceptions were filed on behalf of the Franklin Township Board of Education, the Township of Franklin and the Elk Township Board of Education pursuant to N.J.A.C. 1:1-16.4a, b and c. Replies to the exceptions were filed on behalf of the Southern Gloucester County Regional School District Board of Education (Delsea).

Exceptions of Franklin Township Board of Education

The Franklin Township Board's exceptions contend that the ALJ failed to sufficiently address the serious facilities problem faced by it in deference to those facilities problems which beset the Delsea Board. Further, the Franklin Board disagrees with the ALJ's finding that dissolution of the regional could not be considered by him since the Elk and Franklin Boards did not follow the statutory dissolution process. The Franklin Board argues that such solution could have been considered in light of the willingness of the ALJ to consider the extraordinary remedy of mandating the issuance of bonds. Additionally, the Board takes exception to the ALJ's finding that none of the parties dispute the architect's projected cost of $8,621,108 for the project if begun by June 1986 and contends that the figure cited represents the architect's estimate submitted by Delsea which has not been verified by any other second source.

The Franklin Board further contends that adoption of the ALJ's recommendations would severely impact upon its ability to

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solve its own facilities problems. Should the Commissioner adopt the ALJ's recommendations, the Franklin Board urges the following modifications and objections.

1. Detailed educational plans and building specifications should be made readily available to the public at several locations a substantial time prior to the public hearing that Judge Thomas has suggested take place before the Commissioner issues a final decision in this matter.

2. The Commissioner should consult with all interested parties concerning the format and procedure to be followed in conducting the public hearing to assure that it is an objective forum for the gathering of information rather than a session to bolster the decision already made.

3. We strongly object to the Commissioner making the initial decision available prior to the public hearing, unless it is made readily available along with the briefs filed by all parties setting forth their positions as well. Making only the initial decision available to the public would greatly prejudice the Franklin Board as it fails to set forth the serious and extensive facility problems faced by Franklin Board which have been acknowledged by the County Superintendent and the Bureau of Facility Planning. (Exceptions, at pp. 2-3)

Exceptions of Franklin Township

Franklin Township's exceptions represent a resubmission of the letter brief it filed before the ALJ which set forth its position relative to the matters before the Commissioner. Essentially such submission argues against what it conceived to be a piecemeal approach to solution of the educational housing problems of the various constituencies involved. The municipal governing body urges the Commissioner to establish a task force to specifically study the situation and recommend a solution. The municipal governing body likewise challenges whether the Commissioner has the authority to require the issuance of bonds, arguing that Upper Freehold, supra, effectively solved the problem existing in that district while the recommended decision in this matter would not resolve the entire problem of shortage of educational space for all parties.

Exceptions of Elk Township Board of Education

The Elk Township Board initially argues that, contrary to the ALJ's findings, the Commissioner does have authority to proceed

with dissolution procedures based upon the factual situation presented in the record of this matter. The Board contends that the ALJ gave very little attention to the arguments presented in favor of a remedy deriving from Elk Township's withdrawal from the regional because of the above finding. The Board concludes its exceptions by pointing out that dissolution of the regional represents the only remedy agreed upon by the two constituent boards of education and, thus, urges the Commissioner to adopt the remedy of dissolution.

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Reply Exceptions of Delsea Regional Board

Delsea, in its reply to the exceptions of the above parties, denies that the solution in this matter must provide an answer to all facilities problems. Delsea argues that the extent of Franklin's facilities problems has not been fully defined while those of Delsea can be readily defined by virtue of its 18 years of double sessions, seven referenda defeats, and its lack of certification by the State Department of Education. Delsea further disputes the assertion that it will be able to return to single sessions for five years if the regional is dissolved and Elk Township students are permitted to go elsewhere in a sending-receiving relationship. Delsea contends that even with the withdrawal of Elk Township students, the high school would operate above functional capacity from the first day.

Delsea argues in support of the finding by the ALJ that neither he nor the Commissioner could reach a conclusion which would permit a withdrawal from the regional by Franklin Township, and thus, in effect, result in dissolution. Such withdrawal process, argues Delsea, is strictly prescribed by the provisions of N.J.S.A. 18A:13-51 et seq. and may not be circumscribed by the Commissioner. That process requires the withdrawing board or municipality, after a report by the county superintendent as to the advisability of withdrawal, to submit a petition to the Commissioner within 30 days for permission to submit the withdrawal proposal to the voters of the withdrawing district and the remaining districts. After the filing of answers to the petition, the matter must be submitted to a Board of Review, consisting of the Commissioner, the State Treasurer and the Director of the Division of Local Government Services, Department of Community Affairs, which is required to hold hearings and issue a determination of whether the matter should be permitted to be set before the voters of the regional and the potential withdrawing district. No such application has been submitted in this matter and therefore, argues Delsea, the Commissioner may not consider such a solution in the absence of a resort to the carefully prescribed statutory procedure. Notwithstanding the above, Delsea further points out that the Gloucester County Superintendent of Schools did undertake an advisability study and recommended against a withdrawal from the regional because he determined that withdrawal and subsequent dissolution of the regional would not solve the overcrowding conditions of Delsea Regional High School.

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In conclusion, Delsea Township argues against delay in this matter merely because the Franklin Township Board believes the issuance of bonds to build a middle school would have a negative effect upon Franklin Township's efforts to solve its own K-6 facilities problem.

The Commissioner has carefully reviewed the arguments presented by the parties, the pre- and post-hearing briefs and memoranda of law and the record of the proceeding, as well as the exceptions submitted to the recommended report and decision. Additionally, a representative of the Commissioner conducted a public hearing on March 11, 1986 for purposes of permitting members of the public to express their views as to the recommended decision of the ALJ. The taped record of that hearing has been reviewed for purposes of rendering this decision and is incorporated herein as part of the official record of the proceedings.

In assessing the arguments presented by those opposed to the ALJ's recommendations, the Commissioner notes that the common thread running through all such exceptions is the recommendation that the regional be dissolved by virtue of the withdrawal of Elk Township, and thus granting to Franklin Township control over the entire remaining K-12 student population. The prescription of such dissolution of the regional is that Franklin Township would thus be in a position to develop and present a facilities plan which would simultaneously meet the total facilities needs of the entire K-12 population. In assessing such assertion, the Commissioner notes, as did the ALJ and Delsea's exceptions, that the Gloucester County Superintendent of Schools, Peter Contini, in a withdrawal advisability study undertaken at the request of the Elk and Franklin Township Boards of Education concluded that such withdrawal was not advisable. Although an earlier feasibility study conducted by Mr. Contini considered the withdrawal of Elk Township from the regional and the establishment of a sending-receiving relationship with Clearview Regional as being feasible, he ultimately determined such a course of action "***would not be advisable, and should not be recommended. It is clear that the need for two capital construction projects exist (sic) whether under the present three school district structure or the proposed K-12 organization." (emphasis supplied) (Report of the County Superintendent of Schools on the Advisability of the Withdrawal of Elk Township and Franklin Township from the Southern Gloucester County Regional High School District, April 2, 1985, at p. 72)

In response to the Elk and Franklin Boards' contention that the Commissioner, notwithstanding failure on their part to formally pursue statutorily prescribed means for withdrawing from a limited purpose regional school district, has authority to direct a dissolution of the regional, the Commissioner is impelled to agree with the ALJ that the clear language of N.J.S.A. 18A:13-51 et seq. precludes any action on his part to circumvent the process prescribed by law. As further noted, the ultimate authority for determining whether a withdrawal from a regional may be effectuated

rests with the electorate of both the district seeking withdrawal and the regional as a whole. N.J.S.A. 18A:13-57 Even an affirmative finding of the Board of Review established by legislative design merely represents permission to submit the matter to a decision of the voters. N.J.S.A. 18A:13-56 Consequently, the Commissioner adopts the finding of the ALJ that the issue of withdrawal from the regional and thus its dissolution was not properly before him nor within his or the Commissioner's authority to grant within the context of the consolidated case.

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The Commissioner notes the considerable stress in the exceptions entered by Elk Township Board and the Board and governing body of Franklin Township placed upon their opposition to the ALJ's recommendation based upon the fact that adoption of such recommendation would only resolve the facilities problems of the Delsea Regional School District but ignores and even exacerbates what has been characterized as the serious facilities needs of the Franklin Township School District. Indeed, as one possible solution, it is recommended by Franklin Township that a task force be created by the Commissioner for purposes of designing a comprehensive solution to the entire facilities problem K-12.

The Commissioner finds little merit in the argument that all facility problems must be addressed simultaneously before he can afford relief to Delsea Regional which has been victimized by 18 years of double sessions and seven times refused such relief by the voters. While the Franklin Township Board may face the necessity for addressing its facilities needs, there exists no assurance that even the development and presentation of the most carefully planned and articulated program for addressing all facilities needs K-12 would fare any better before the voters of Franklin Township than the plans developed and presented by Delsea Regional for solving its own facilities problems. Nor is there any evidence that a so-called "total" solution would be any less costly or any more efficient since the record of this matter makes abundantly clear that the high school, whether Delsea Regional or Franklin Township, will quickly require additional space to accommodate its secondary student population and to afford a thorough and efficient education, notwithstanding any other educational facility which may be built or altered by the Franklin Board. Further, the Commissioner cannot view the suggestion to form a task force for reviewing a "total" facilities solution as having any other outcome than to introduce a further delay to a problem that has waited 18 years for a solution. He is likewise unpersuaded by arguments that the voters of Franklin Township are any more likely to approve a solution to this problem simply because they will have full control over their children's education should Elk Township be allowed to withdraw and they assume K-12 educational responsibility. As to the Franklin Board's argument that the adoption of the ALJ's recommendation will act to the detriment of that elementary district's attempts to solve its own facilities problem, the Commissioner is unpersuaded that restraint on his part in ordering the bonds for the Delsea project would in any way enhance the Franklin Board's prospects for solving its elementary facilities problem. Even were he so persuaded, he

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could not in good conscience defer the solution to the 18-year-old secondary school problem in order to provide a solution to the elementary problem

Ultimately, of prime importance to be addressed in this decision is the issue of the Commissioner's authority to direct the resolution of this problem as recommended by the ALJ. This becomes most critical in light of the challenge to said authority raised by Franklin Township.

In the Commissioner's view the ALJ's recommended decision more than amply documents the authority of the Commissioner to direct the relief recommended therein. (See Initial Decision, ante) Notwithstanding such recitation of statutory and judicial precedent, the Commissioner feels obliged to deal with the contention that Upper Freehold, supra, is distinguishable from the instant matter because the issuance of bonds in that matter "...would effectively resolve the condition which was causing water damage and severe inconvenience in the school on a long term basis. To the contrary, in the case at bar, the proposal of the Southern Gloucester County Regional High School District does not begin to address the overall educational problems that faces (sic) the Township of Franklin." (Letter Memorandum of Township of Franklin, October 11, 1985, submitted as exceptions, at p. 3)

In addressing the aforestated position of the Township of Franklin, the Commissioner emphasizes that the clear and unequivocal language of the Supreme Court decision in Upper Freehold, supra, which follows supports the general proposition that the Commissioner has the authority which Franklin Township seeks to deny:

> The sole issue in this case is whether the Commissioner and State Board of Education, pursuant to the constitutional and statutory obligation to provide a thorough and efficient education, can direct a local school district to issue bonds for a capital project for a public school, after the voters of the district have rejected referenda to finance the project. We conclude that the Commissioner and the State Board have the power to direct the issuance of bonds and that their order is legal authority to constitute the bonds as valid and binding obligations of the school district. (emphasis supplied) (86 N.J. at 268)

It is to be noted from the foregoing that the language does not place conditions that the authority be limited to such circumstances where the required capital project represents a "total solution" to a facilities problem or be a circumstance which exactly parallels that which prevailed in Upper Freehold, supra. When the issues involved have related to the ability of a school district to provide a thorough and efficient education, the Court has taken an expansive view of the Commissioner's authority as illustrated from the following language:

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> In circumstances analogous to this case, we have found that the Commissioner has the implied power to appropriate additional funds for a school budget after the budget has been rejected by the voters and reduced by the governing body. We stated that, although the Commissioner had no express authority to order the budget increases, the power was derived from his duty to assure that every school district provides a thorough and efficient education. Board of Educ. v. City Council of Elizabeth, 55 N.J. 501, 506 (1970) (in Type I school districts, Commissioner has power to reject the annual school budget and to direct an increase over the amount fixed by the governing body); Board of Educ., East Brunswick Twp. v. Township Council, 48 N.J. 94, 107 (1966) (the Commissioner has power to reject and fix a budget within limits originally proposed by the Board of Education where the budget proposed by the Board was rejected by voters and modified by the governing body).
>
> The Court stated in Elizabeth that the duty to assure a thorough and efficient education necessarily includes provision for adequate physical facilities. 55 N.J. at 506. Thus, even before the enactment of the 1975 Act, we had declared that the Commissioner had the implied power to direct capital improvements.***
>
> (Id. at 275)

The above-cited authority is of course limited by the following admonition of the Court:

> Should similar cases arise in the future, the public should have the right to participate in hearings before the Commissioner. When proceeding in the face of voter rejection, the Commissioner should exercise restraint in authorizing the issuance of bonds. Any order of the Commissioner or State Board authorizing the issuance of bonds would be subject, of course, to judicial review. (Id. at 280)

Having cited above the Court's recommendations relative to public participation, the Commissioner deems it necessary to respond to the recommendations raised by the Franklin Board relative to the public hearing held on March 11, 1986.

The Commissioner finds the recommendation that detailed educational plans and building specifications be made available prior to such hearing to be totally without merit since the purpose of the hearing is clearly to permit the public to express its views

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on the recommendation to issue bonds and not on whether they approve of the specific building plans. Further, the suggestions that consultation take place relative to procedures to be followed in the conduct of the hearing to ensure that they are information gathering and not to bolster the ALJ's recommendations is moot by virtue of the fact that such hearing has already taken place. The nature of such hearing was, as may be verified by the taped proceedings, conducted solely as a means of providing community input into the Commissioner's final determination. All citizen input was received without comment or rebuttal. Franklin Board's contention that the recommended decision should not have been made available prior to the public hearing must be rejected as being inconsistent with state law which makes such document a matter of public record upon its issuance. N.J.S.A. 47:1A-1 et seq. Further, the suggestion that the recommended decision only be made available if accompanied by the briefs submitted by all the parties is one that must be rejected if only for its impracticality.

Aware as he is of the Court's admonition to utilize his authority with restraint, the Commissioner does not lightly undertake to direct the issuance of bonds for a capital project. Indeed, in no circumstance other than Upper Freehold has the Commissioner exercised his authority to so direct. The circumstances which prevail in this matter, 18 years of double sessions with seven referenda defeats with no relief in sight, dictate the adoption of a course of action long held in restraint. Ultimately, the most compelling argument in favor of the unusual remedy recommended by the ALJ was presented in the testimony of a mother of a student from Delsea Regional High School. The testimony of this mother that she wanted her child to escape from the effects of double sessions which she herself had to bear as a student of Delsea Regional was convincing argument that the time for decision was at hand. Imposing the burdens of a less than thorough and efficient education on a second generation of students cannot be condoned.

Consequently and for the reasons contained therein the Commissioner adopts the recommended report and decision of the Administrative Law Judge and makes it his own. The Commissioner therefore directs the issuance of bonds in an amount sufficient to construct a middle school in the Southern Gloucester County Regional High School District.

Further, the Commissioner directs that the cost factor of such project, currently set at $8,621,108, be reviewed and approved by the Bureau of Facility Planning Services of the State Department of Education.

COMMISSIONER OF EDUCATION

March 31,1986

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RICHARD J. MURPHY
ADMINISTRATIVE LAW JUDGE

February 10, 1986

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LETTER OPINION/ORDER

RE: STEPHEN ROSBERT v. BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY
OAL DKT. NO. EDU 6028-85
AGENCY DKT. NO. 298-8/85

Dear Counsel:

This opinion is in response to petitioner Rosbert's motion of December 9, 1985, for partial summary decision, which is granted for the reasons set forth below. The petitioner alleges that the respondent Board violated his tenure and seniority rights by refusing to reemploy him in a full-time industrial arts teaching position that had been created following his acceptance of and resignation from a part-time position offered to him when his prior full-time position was abolished. In Count One of the petition of appeal, which is the basis for the summary decision motion, the petitioner seeks a finding and declaration that the respondent Board acted contrary to law in refusing to reemploy petitioner in the full-time position, and an order directing the respondent to do so, with all due back pay, interest and cost of suit.

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FINDINGS OF FACT

The petitioner's moving papers, as well as the respondent's response, show that there is no genuine issue as to any material fact necessary to decide this motion. Those facts are as follows:

1. That on or about September 1, 1971, petitioner began employment as a teacher in the respondent's school district and was tenured within the meaning of 18A:28-5 at all times relevant to this dispute;

2. That on or about April 22, 1982, respondent determined to abolish the full-time industrial arts position held by the petitioner and to create in its place a part-time industrial arts position, effective September 1, 1982;

3. That respondent, by letter dated April 27, 1982, offered, through it superintendent of schools, the newly created part-time industrial arts position to the petitioner (see P-1 attached), which offer of part-time employment was accepted by the petitioner on May 17, 1982, for the 1982-83 school year. (P-2 attached);

4. That on July 6, 1982, petitioner wrote to Mr. Barry Ersek, superintendent of schools, stating that "I do not intend to return to Haddonfield High School this September, on a half-time basis. If a full-time position is available, I would consider that position." (P-3 attached);

5. That at its regular meeting on July 22, 1982, the Haddonfield Board of Education voted to accept a resignation of "Mr. Stephen A. Rosbert, Jr., High School Industrial Arts Teacher, effective 7/6/82." (P-4, P-5 attached);

6. That on July 26, 1982, the Haddonfield Board of Education sent a letter to petitioner stating that "[a]t its official Public Board Meeting on July 22nd, the Haddonfield Board of Education accepted your letter of resignation. May we wish you good luck in your future endeavors." (P-6 attached);

7. That during May 1985, petitioner became aware that a full-time industrial arts teaching position had been created in the respondent's school district for the 1985-86 school year and that he wrote to the respondent Board on May 29, 1985, indicating that he had just received notice of the full-time position and stating that "[i]t was my understanding that under the conditions which resulted in my leaving Haddonfield's employment, i.e. RIF, that I was to be placed on the preferred eligibility list and be notified when a position became available." (P-7 attached);

8. That on June 10, 1985, the respondent Board wrote to the petitioner in response advising that "due to your resignation which the Board accepted on July 22, 1982, you retain no rights to a preferential rehiring. Accordingly, you have no tenure or other rights to the position." (P-8 attached).

There is no genuine issue to any of the above material facts and I so FIND.

ISSUES

The issue is framed by the petitioner as to whether he is entitled as a matter of law to the full-time industrial arts teaching position created after his resignation. Respondent submits the following issues for resolution:

1. Was petitioner's resignation letter of July 6, 1982, a resignation from a part-time position only or from full time as well?

2. Did the acceptance of the resignation by the respondent Board extinguish any rights of the petitioner by seniority or otherwise to a fulltime position?

3. Did the respondent Board have a legal right to rescind the resignation after acceptance?

4. Is the petitioner barred by laches?

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ARGUMENTS OF THE PARTIES

Petitioner argues that he is entitled to summary decision as a matter of law pursuant to N.J.S.A. 18A:28-12 which provides:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs. . . .

Petitioner particularly relies upon his letter of July 6, 1982, and argues that in that letter he specifically indicated that he would consider a full-time position if one became available and thereby preserved his right to remain on the preferred eligibility list. Petitioner also argues that neither acceptance of nor resignation from the part-time position that he was offered constitutes a waiver of his statutory right of preferred eligibility for the full-time position, although resignation did preclude him from again seeking the part-time job on a preferred basis. In support of this contention, petitioner cites several opinions holding that the seniority rights of full-time teaching staff members are not impaired by either acceptance of or rejection of part-time employment. See, Mishkin v. Mountainside Board of Education, N.J. App. Div. Nov. 2, 1984, A-803-83T2 (unreported); Ralph Boguszewski v. Board of Education of the Borough of Demarest, Bergen County, 1979 S.L.D. 232; Adele Vexler v. Board of Education of the Borough of Red Bank, Monmouth County, 1980 S.L.D. 272.

Respondent argues that summary decision should not be granted in this instance because there is an issue as to the petitioner's intent when he drafted his July 6, 1982 letter of resignation as well as his state of mind upon receipt of the Board's July 26, 1982 letter which acknowledged the resignation. It is further argued that petitioner's letter of July 6 only states that he did not intend to return on a halftime basis to Haddonfield High "this September," meaning the 1982-1983 school year. Also noted by the respondent is the fact that petitioner did nothing when he received the Board's July 26 acceptance letter, and further waited three years before raising any question as to the conditions of his departure. Respondent contends that there is therefore a question as to the petitioner's intent at the time of his resignation which requires a plenary hearing to resolve.

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Respondent also argues that the petitioner's claim should be barred by the doctrine of laches because of his inexcusable delay in asserting it, resulting in changed conditions consisting of the hiring of a new teacher to replace him. Respondent specifically contends that petitioner took no action when he was advised of the acceptance of his letter of resignation and did not do so much as request an explanation of the Board's action.

Respondent's final argument is that the cases cited by the petitioner, namely, Boguszewski and Mishkin, involved full factual hearings to explore the circumstances surrounding resignations, and were otherwise inapposite. Suchahearing is also necessary here, respondent contends, in order to probe the petitioner's "true motives." (Respondent's Brief at 8.)

DISCUSSION AND CONCLUSIONS OF LAW

The cases are clear that a tenured employee protected by N.J.S.A. 18A:28-1[illegible] may, if subjected to a reduction in force, refuse to accept a part-time position with[illegible] impairing or abandoning tenure entitlement of preferred eligibility to full-time employment. See, Vexler. It is further noted that in the Mishkin case, a tenured speech teacher who resigned from part-time employment did not by so doing waive her preferred eligibility to a full-time position when one became available, though she was foreclosed from pursuing the part-time job on a preferred basis by the resignation. The letter of resignation in that case, as set forth by respondent on pages 7-8 of his brief, is similar to the petitioner's July 6 letter to the extent that it fully indicates a continuing interest in a full-time position.

The essential principle espoused and enuniciated by all of the above cases is that a teacher whose tenure rights are statutorily protected has a right to preferred eligibility regardless of whether he or she refuses, accepts, or accepts and then resigns from a part-time position. The cases are clear that a tenured employee's response to an offer of part-time employment, which he or she is entitled to receive, has no bearing on reemployment rights where the resignation is clearly limited to the part-time position, as is the case in this matter. Respondent's argument that petitioner's resignation was not so limited disregards the express language of that resignation letter, which clearly states that "[i]f a full-time position is available [he] would consider that position."

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Respondent strains to create an issue of intent when the language of the resignation clearly indicates the petitioner's desire to resign from part-time employment only and to remain eligible for a full-time position if one became available.

Respondent's argument as to laches is also unpersuasive in that there is no evidence whatsover to conclude that the petitioner delayed in asserting his preferred eligibility right to the new full-time position. While there may be some prejudice to the respondent in that another individual has been hired to teach industrial arts, the record reflects that the petitioner attempted to assert his preferred eligibility rights shortly after he became aware of the new full-time position. Laches apply only where there is an unexplained and inexcusable delay in enforcing a known right resulting in prejudice to another party. See Lavin v. Board of Education of Hackensack, 90 N.J. 145 (1982). In this instance, the petitioner could not assert his preferred eligibility right until he became aware that a full-time position was available to occupy.

As to petitioner's argument that the Michkin and Boguszewski cases both involved plenary hearings addressing issues of intent, it is noted that similar issues have been addressed by summary decision in comparable cases. See, e.g., Vexler; Cerra v. Board of Education of North Hunterdon Regional High School, Hunterdon County, OAL DKT. EDU 5764-82 (March 23, 1983), aff'd by Comm., May 6, 1983. Here the documentary evidence is clear in expess terms and no practical purpose would be served by a full factual hearing.

On the basis of the above findings of fact and discussion of law, I **CONCLUDE** that there is no genuine issue as to any material fact challenged and the petitioner is entitled to prevail as a matter of law.

I further **CONCLUDE**, with respect to the specific issues presented, that the petitioner is entitled to preferred eligibility for a full-time position created after his resignation from a part-time position in that his letter of resignation clearly reserved his right to future full-time employment. I **CONCLUDE**, with respect to issues raised by the respondent, that:

1. The petitioner's resignation of July 6, 1982, was a resignation only from part-time position and not from a future full-time position;

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2. That the acceptance of the resignation from the part-time position by the respondent Board did not extinguish or affect any rights of the petitioner by seniority or otherwise to a full-time position.

3. That the petitioner is not barred by the doctrine of laches from asserting his preferred eligibility right to the full-time position in that there was no inexcusable delay in this instance.[1]

ORDER

On the basis of the above findings of fact and conclusions of law, it is **ORDERED** that the petitioner's motion for partial summary judgment is granted and the relief requested in count one of the petition of appeal is awarded.

It is further **ORDERED** that this partial summary decision shall not be effective until the final agency decision has been rendered on the issue, either upon interlocutory review pursuant to N.J.A.C. 1:1-9.7 or at the end of the contested case, pursuant to N.J.A.C. 1:1-16.5.

It is further **ORDERED**, pursuant to N.J.A.C. 1:1-13.3(b) for the purpose of avoiding unnecessary litigation or expense by the parties, that this decision, as well as exhibits and the briefs of the parties, will be submitted to the agency head for immediate review as an initial decision, pursuant to N.J.A.C. 1:1-16.4, 16.5 and 16.6. Further proceedings as to the issue of whether a full-time position was available prior to 1985 will be stayed pending the result of the agency head's decision as to whether the petitioner had a right to the full-time industrial arts teaching position.

Very truly yours,

RICHARD J. MURPHY
Administrative Law Judge

---

[1] Respondent had also raised an issue as to whether the respondent Board had a legal right to rescind the resignation after acceptance. In that this opinion finds that the resignation was limited to the part-time position, this issue is not dispositive of or relevant to the question of the full-time position and therefore is not addressed.

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LIST OF EXHIBITS

P-1	Letter of April 27, 1982, from Barry Ersek
P-2	Letter of April 22, 1982, from Ben Schoellkopf to petitioner, and petitioner's acceptance, of May 17, 1982
P-3	Letter of July 6, 1982, from petitioner to Barry Ersek
P-4	Minutes of the respondent Board from July 22, 1982
P-5	Memo from Barry Ersek of July 8, 1982, to the Board
P-6	Letter of July 26, 1982, from Ben Schoellkopf to petitioner
P-7	Letter of May 29, 1985, from the petitioner to Barry Ersek
P-8	Letter of June 10, 1985, from Barry Ersek to the petitioner

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STEPHEN ROSBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and recommended report and decision rendered by the Office of Administrative Law in the form of a partial summary decision have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board raises the following points by way of exception.

I. THE ADMINISTRATIVE LAW JUDGE ERRONEOUSLY GRANTED PARTIAL SUMMARY JUDGMENT SINCE GENUINE ISSUES OF MATERIAL FACT ARE PRESENT AS TO PETITIONER'S KNOWLEDGE AND SUBJECTIVE INTENT.

The Board avers that comments made by petitioner to the principal at the time of his resignation created a genuine issue of fact as to petitioner's state of mind when he submitted his July 6, 1982 letter of resignation. The Board queries: "Did petitioner intend to only resign from a part-time position and reserve his right to preferred eligibility for a future, full-time position? Or, did petitioner intend to get out of teaching completely and pursue outside interests if he could not be retained on a full-time basis?" (Board's Exceptions, at pp. 5-6) The Board avows that

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petitioner did not want to be an industrial arts teacher with the Haddonfield School System at all upon being riffed from his full-time position, and accordingly, tendered his resignation. The Board avers it should be entitled to a plenary hearing with a right of cross-examination in order to explore petitioner's true state of mind at the time he drafted his July 6, 1982 resignation letter. Further, the Board alleges that petitioner never challenged the Board's action in accepting his total resignation and thus, the Board avers that petitioner's inaction raises serious factual questions as to what petitioner's true intent was in the summer of 1982. The Board cites Kozak v. Township of Waterford, 1976 S.L.D. 633, 640 for the proposition that it was incumbent upon petitioner, if there were some ambiguity, to request an explanation from the Board as to why it accepted his resignation at the time he received its acknowledgement of his resignation.

Additionally, the Board avers the ALJ improperly relied on the decisions in Boguszewski v. Demarest, 1979 S.L.D. 232 and Mishkin v. Mountainside Board of Education, Docket No. A-803-83T2, New Jersey Superior Court, Appellate Division, November 2, 1984, in granting partial summary decision, since both cases involved full factual hearings wherein the circumstances surrounding the teacher's leaving were fully explored. Further, the Board alleges that in granting partial summary decision, the ALJ improperly gave petitioner's evidence the benefit of doubt when the standard for summary disposition mandates the opposite, that all inferences of doubt are drawn against the movant in favor of the opponent of the motion. Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 76 (1954)

Finally, the Board distinguished the ALJ's application of Cerra v. North Hunterdon, decided by the Commissioner May 6, 1983 and Vexler v. Red Bank, 1980 S.L.D. 272 because in those cases, subjective factual issues were not involved.

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II. A PLENARY HEARING IS NECESSARY ON THE ISSUE OF LATCHES (SIC).

The Board strongly contends that in the instant matter laches is relevant to petitioner's total conduct upon receipt of the Board's July 26, 1982 letter acknowledging his resignation, not just his awareness of when a full-time position became available. The Board's position is that petitioner's three-year period of silence after receiving the Board's acknowledgement of his resignation resulted in prejudice to the Board since it had treated petitioner's resignation accordingly and hired another individual for the 1985-86 school year. The Board further avers that if petitioner knew at the time of receiving the Board's acknowledgement of his resignation that the Board was mistaken in its treatment of his resignation or that the Board had not accepted the resignation on the terms petitioner intended to offer, petitioner's failure to challenge the Board's action, or at least request an explanation, creates a factual issue regarding laches.

III. ANY AWARD OF BACKPAY IS SUBJECT TO MITIGATION OF DAMAGES.

The Board avers that if the initial decision of the ALJ is upheld by the Commissioner, the ALJ's order for relief should be clarified in that any award for backpay will be reduced by actual earnings of petitioner in accordance with established mitigation principles. Further, the Board argues, the awarding of interest

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should not be allowed, and it cites Hogue v. Bd. of Ed. of Teaneck, decided by the Commissioner November 14, 1983 and Bartlett v. Bd. of Ed. of Wall Township, 1971 S.L.D. 163 for that proposition.

Petitioner's reply exceptions initially contend that it was not necessary for the ALJ to consider the principal's affidavit concerning petitioner's intent when he submitted his letter of resignation, since the resignation letter submitted by petitioner was clear that "he was only resigning from the part-time position he had previously accepted and would reconsider if a full-time position did become available." (Petitioner's Reply Exceptions, at p. 1) Petitioner avers that the letter of resignation coupled with his attempts to have a full-time position made available to him make it clear that no factual dispute as to his intent needed to be resolved by the ALJ.

Further, petitioner avers that the Board is incorrect in asserting that the ALJ failed to give proper consideration to the issue of laches. Petitioner avows that his claim that the Board failed to offer him the full-time position created in the 1985-86 school year and possible other full-time positions in previous years was made in timely fashion. Petitioner asserts, "The record contains absolutely no evidence, that [he] ever knowingly and intentionally waived the statutory rights guaranteed to him by N.J.S.A. 18A:28-12." (Petitioner's Reply Exceptions, at p. 4)

Finally, petitioner agrees with the Board that established mitigation principles should be applied to the award of backpay. However, petitioner disputes the contention of the Board that interest should not be allowed. Citing David Bryan and the Mainland

Teachers' Association v. Board of Education of the Mainland Regional High School District, Atlantic County, decided by the Commissioner on remand December 4, 1985 and Board of Education of the City of Newark v. Levitt and Sasloe, 197 N.J. Super. 239 (App. Div. 1984), petitioner submits that on the facts of this case, he is entitled to both pre-judgment and post-judgment interest.

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The Commissioner has reviewed the respective arguments of the parties regarding the matter controverted herein as well as the letter opinion/order of the ALJ. He finds there is a genuine issue of material fact in dispute and thus rejects the Order granting petitioner's Motion for Partial Summary Judgment as set forth in Count I of the Petition of Appeal.

As set forth in the State Board's reversal on March 6, 1985 in Paul Gordon v. Board of Education of the Township of Passaic, Morris County, decided by the Commissioner October 31, 1983:

> N.J.A.C. 6:24-1.2 requires that petitions of appeal in matters arising under the school laws be filed within 90 days of notice of a ruling affecting the petitioner. The relevant case law holds that the 90-day rule is to be strictly applied and that the time in which the petition must be filed be measured from the time when the cause of action accrued. See, e.g., Watchung Hills Regional Education Association v. Watchung Hills Regional High School District, 1980 S.L.D. 356. (Slip Opinion, at p. 5)

The State Board further stated:

> ***Petitioner-Respondent's cause of action accrued*** when he became aware that the Board had created the vocal/instrumental position.*** (Id., at p. 5)

In the instant matter, the record is unclear as to exactly when petitioner became aware of the 1985 position for a full-time

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industrial arts teacher. While it is stated in petitioner's Memorandum of Law in Support of Petitioner's Motion for Partial Summary Decision that

> During May, 1985 Petitioner became aware that a full-time industrial arts position was available in Respondent's district for the 1985-86 school year. He wrote and requested placement in said position by letter dated on or about May 29, 1985 *** (at pp. 1-2)

it must be determined exactly when in May 1985 petitioner was apprised by the teacher placement agency, with whom he was in contact, of the vacancy in question. It is this date, not the date upon which he wrote requesting placement in said position that triggers the ninety days for filing a Petition of Appeal.

Accordingly, the Commissioner rejects the Order granting Partial Summary Decision as set forth in Count 5 of the Petition of Appeal and remands the matter to the Office of Administrative Law for findings consistent with this decision and for disposition of any remaining issues.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

APRIL 2, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 6028-85
AGENCY DKT. NO. 298-8/85

STEPHEN ROSBERT,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,
Respondent.

Barbara E. Riefberg, Esq., for petitioner (Selikoff & Cohen, attorneys)

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: July 16, 1986 Decided: August 4, 1986

BEFORE **RICHARD J. MURPHY, ALJ:**

The petitioner, Stephen Rosbert, challenged the action of the respondent Board in not reemploying him in a full-time position created after his resignation. The matter was transmitted to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

The parties have agreed to a settlement and have prepared a Settlement Agreement indicating the terms thereof, which is attached and fully incorporated herein.

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I have reviewed the record and the terms of settlement and I **FIND.**

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures or their representatives' signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Aug 4, 1986
DATE

RICHARD J. MURPHY, ALJ

AUG 6 1986
DATE

Receipt acknowledged.

DEPARTMENT OF EDUCATION

Mailed To Parties:

AUG 7 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ds

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SETTLEMENT AGREEMENT

THIS AGREEMENT made by and between the Haddonfield Board of Education, a body corporate and politic of the State of New Jersey, located at Lincoln Avenue and Railroad, Haddonfield, New Jersey 08033, hereinafter referred to as "the Board", and Stephen Rosbert, residing at 355 South Old White Horse Pike, Waterford, New Jersey 08009, hereinafter referred to as "Rosbert",

WITNESSETH

WHEREAS, certain matters of disagreement have arisen between the parties hereto; and

WHEREAS, the parties hereto desire to amicably settle and resolve such differences;

NOW, THEREFORE, in consideration of the mutual covenants and terms contained herein, the parties agree as follows:

1. The Board shall pay to Rosbert $10,000 as general damages, due after July 1, 1986. Since this sum is being paid as general damages, no deductions are to be made.

2. Rosbert shall tender and the Board shall accept, with no elaboration or discussion, a letter dated June 2, 1986 whereby Rosbert unconditionally, resigns from any employment with the Board or placement on any preferred eligibiliy list.

3. Should the Board fail to pay Rosbert all monies owed to him under this Settlement Agreement by July 15, 1986, Rosbert shall be entitled to have any arrearages

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thereon reduced to judgment against the Board upon the filing of an Affidavit with any tribunal having jurisdiction.

4. In no event shall the Board, or any of its agents, employees or representatives, make any statement to a prospective employer, verbal or written, which is adverse to Rosbert's interest.

5. Upon the execution of this Agreement, Rosbert agrees to withdraw the litigation he commenced before the Commissioner of Education and now captioned "Stephen Rosbert v. Board of Education of Boro of Haddonfield, OAL Docket No. EDU 06028-85, Agency Ref. No. 298-8/85."

6. It is understood and agreed that the signing of this Release and payment of monies are for the sole purpose of bringing about an amicable adjustment between the parties and to avoid further costs of litigation. It is further understood and agreed that the payment of general damages by the Haddonfield Board of Education is not to be construed as an admission of liability or wrongdoing, and that the Haddonfield Board of Education expressly denies any liability or wrongdoing concerning my employment in the Haddonfield School District.

IN WITNESS WHEREOF, the parties hereto have set

their hands and seals this [illegible] day of [illegible], 1986.

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ATTEST:

BOARD SECRETARY

HADDONFIELD BOARD OF EDUCATION

BOARD PRESIDENT

DATED: [illegible]

WITNESS

STEPHEN ROSBERT

DATED: [illegible]

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STEPHEN ROSBERT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HADDONFIELD, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law in the form of a joint stipulation of settlement have been reviewed.

The Commissioner approves the settlement terms and adopts them as a final decision in this matter. He notes that term 3 of the settlement states that

> Should the Board fail to pay Rosbert all monies owed to him under this Settlement Agreement by July 15, 1986, Rosbert shall be entitled to have any arrearages thereon reduced to judgment against the Board upon the filing of an Affidavit with any tribunal having jurisdiction.
> (Settlement, at pp. 1-2)

With respect to this, it must be emphasized that any settlement of a matter before the Commissioner is subject to his approval and that the terms of a settlement are not to be executed prior to his approval or 45 days have expired from the date of the initial decision. N.J.S.A. 52:14B-10 Therefore, counsel and the presiding ALJ in this matter are cautioned that in the future such

terms are not to appear in any settlement of a matter before the Commissioner.

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The matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

SEPTEMBER 9, 1986

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IN THE MATTER OF THE SPECIAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	ORDER
OF GARFIELD, BERGEN COUNTY.	:	
	:	

The Board of Education of the City of Garfield, hereinafter "Board," has petitioned the Commissioner of Education to make available a supplemental amount of $308,000 in current expense appropriations for the 1985-86 school year through the certification of such additional amount of funds to the Bergen County Board of Taxation to be included in the local tax levy for the 1986-87 school year.

It is observed that the Board had adopted a current expense budget for the 1985-86 school year of $7,630,000 which was at the maximum permitted level for current expense purposes. It is further observed that said 1985-86 current expense budget was defeated by the electorate and subsequently reduced by the Garfield City Council by $183,500. This matter was appealed by the Board to the Commissioner who, as the result of a plenary hearing conducted between the parties, restored an amount of $84,000 in current expenses to the local tax levy for the 1985-86 school year. Such amount when added to the original certification of $7,447,300 by City Council resulted in a total amount of $7,531,300 to be raised by local taxation in current expenses for use by the Board during the 1985-86 school year. See Board of Education of the City of Garfield v. Mayor and Council of the City of Garfield, Bergen County, decided March 27, 1986.

The Board's application herein, however, for $308,000 is due to a budget shortfall which originally occurred during the 1984-85 school year and has been carried over to the 1985-86 school year and remains outstanding to date. It was not included as part of the Board's current expense appropriations request for the 1985-86 school year; however, the Board contends that such deficit directly impacts upon its ability to provide the necessary financial resources required to meet its financial obligations for the 1985-86 school year.

Consequently, the Board maintains that without the additional amount of $308,000 in current expenses it has requested to be raised in the local tax levy, it would thereby be in noncompliance with the State's constitutional and statutory mandates pursuant to the provisions of Chapter 212, Laws of 1975, to provide a thorough and efficient system of education for its pupils for the 1985-86 school year. N.J.S.A. 18A:7A-1 et seq.

The Commissioner has reviewed this matter and takes official notice of two documents prepared by the Department pertaining to the Board's request for an additional $308,000 in current expense appropriations during the 1985-86 school year.

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The first document is in the form of a letter from the Bergen County Superintendent of Schools to the Department's Assistant Commissioner of Finance dated February 14, 1986. It reads in pertinent part as follows:

> ***It is recommended that the school district of Garfield be granted a full restoration of the said amount of $308,204 by means of a supplemental tax certificate to be issued under a directive of the Commissioner of Education. This restoration should eliminate completely the deficit now existing in this school district as reported in the official Audit.
>
> This recommendation is based on the following:
>
> 1. Consideration was given to the time period of sixteen weeks of school remaining in this school year to effect fiscal remedies in programs.
>
> 2. A careful review of those proposed reductions by the Garfield Board of Education, as submitted to you in their letter dated February 7, 1986, has taken place by the staff of the County Office.
>
> 3. A recent visit of the County staff to Garfield has assured us of the sincerity of effort on the part of the Board, the administration, the staff and the students to work cooperatively in overcoming this problem.
>
> 4. The impending monitoring visit has the potential of having more lasting deletorious (sic) effects on the school district than the immediate short-range fiscal problem.***
>
> (C-1)

Upon receipt of the above-cited letter, the Assistant Commissioner of Finance directed a further audit of the City of Garfield's current expense budget projections for the 1985-86 school year. On March 10, 1986 the following report was transmitted to the Assistant Commissioner by his Chief Auditor.

It reads as follows:

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GARFIELD BOARD OF EDUCATION
CURRENT EXPENSE BUDGET PROJECTION

1985-86 Budgeted Revenues		
Local Tax Levy	*$7,447,300	
State Aid	1,314,801	
Miscellaneous	16,000	
Total FY 86 Budgeted Revenues		$8,778,101
1985-86 Projected Expenditures		
Budget Projection	$8,752,783	
Boiler & Machinery Repair	28,740	
Admin. Salary Settlement	29,600	
Total Projected Expenditures		$8,811,123
Excess Expenditures over Budgeted Revenue		$ 33,022
Unanticipated Revenue		
Miscellaneous	$ 20,000	
Chapter 321 (TQEA)	20,923	
		$ 40,923
1984-85 Budget Deficit		$ 302,000
		$ 294,099

[Additional] Funds Required to [Meet its Current Expense Obligations for the 1985-86 School Year Arising from 1984-85 Budget Deficit]

*Amount Originally Certified by City Council

(C-2)

Upon review of those budget projections prepared by the Department's Chief Auditor (C-2), the Commissioner concurs with the amount of the Board's current expense deficit ($294,099) projected for the 1985-86 school year.

However, inasmuch as $84,000 has previously been restored to the local tax levy as the result of the Board's 1985-86 budget appeal, the projected budget deficit of $294,099 is hereby reduced by $84,000 to reflect a total projected current expense budget deficit of $210,099.

The Commissioner, therefore, finds and determines at this juncture that it is necessary for the Board to have sufficient funds to meet the constitutional mandate to provide a thorough and efficient system of education during the 1985-86 school year.

However, it is also incumbent upon the Board to maintain expenditures within the amounts originally appropriated.

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It is further found and determined that final disposition of this matter may be subject to an adversarial proceeding between the Board and Mayor and Council of the City of Garfield inasmuch as the special election to raise the supplemental current expense appropriations failed to gain voter approval. Therefore, Mayor and Council is hereby granted an opportunity to file its answer to the Board's Petition within 20 days of the receipt of this decision.

Subsequent to the receipt of the above, the matter will be heard on its merits, including a determination as to the cause or causes of the projected deficit, through further proceedings to be conducted by the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. If, as a result of such proceedings, it is finally determined by the Commissioner that the actual amount of the Board's projected deficit for the 1985-86 school year is less than the amount of $210,099, the Commissioner will take appropriate steps, to effect a corresponding reduction in the local tax levy for school purposes.

The Commissioner's determination in this matter is grounded on his prior ruling in In the Matter of the Annual School Election Held in the Red Bank Regional High School District, Monmouth County, decided May 7, 1981.

Moreover, the Commissioner's decision to accelerate proceedings in this matter is based upon the Bergen County Superintendent's directive to the Board prohibiting the Board from effecting a midyear reduction in the number of its teachers in order to remedy its budget deficit for the 1985-86 school year. Such action by the Board in the County Superintendent's appraisal would have had a negative impact upon the Board's ability to provide a thorough and efficient education (N.J.S.A. 18A:7A-1 et seq.).

Accordingly, the Board's request for a supplemental tax certification is hereby granted. The Commissioner directs the Bergen County Board of Taxation to certify said amount forthwith in the 1986-87 current expense local school tax levy, subject to further adversarial proceedings between the Board and the Mayor and Council of the City of Garfield.

The Commissioner retains jurisdiction in this matter until a final determination is rendered pursuant to the provisions of N.J.S.A. 18A:6-9 and N.J.S.A. 52:14F-1 et seq.

IT IS SO ORDERED this 3rd day of April 1986.

COMMISSIONER OF EDUCATION

APRIL 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 2893-85
AGENCY DKT. NO. 30-2/85

MARTHA BERTISCH, ELAINE EUFEMIA,
ARLEEN FATIGATI, MARION FRANZ, KAREN GROSSMAN,
LISETTE M. LINDSTROM, JOAN A. MARCELL,
PEGGY-ANN MENDLER, PATRICIA MILLER,
LINDA ROSENTHAL, MYRNA SCHAFFER, JOAN SWENSEN,
ELLA J. THOMAS, WILLIAM J. ZITELLI
Petitioners,
v.
BOARD OF EDUCATION OF
THE BOROUGH OF BERGENFIELD,
Respondent
v.
BERGENFIELD EDUCATION
ASSOCIATION, BERGEN COUNTY
Respondent.

Harold Springstead, Esq., for petitioners, (Aronsohn & Springstead, attorneys)

Clement H. Berne, Esq., for respondent, Bergenfield Board of Education (Greenwood & Sayovitz, attorneys)

Kenneth L. Nowak, Esq., for third party respondent, Bergenfield Education Association (Zazzali, Zazzali & Kroll, attorneys)

Record Closed: January 22, 1986 Decided: February 20, 1986

BEFORE **TIMOTHY N. TUTTLE**, ALJ:

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This matter was brought as the result of a petition filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. On May 21, 1985, the case was transmitted to the Office of Administrative Law, 185 Washington Street, Newark, New Jersey, for determination as a contested matter pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 2, 1985. A Prehearing Order was issued which delineated the following legal issues to be determined:

1. Whether the Board's salary guide placement of the petitioners is in conformance with the applicable education laws;

2. Whether the Commissioner of Education has jurisdiction over the subject matter;

3. Whether petitioners are bound by the agreement between the Board of Education and their authorized bargaining representative, the Bergenfield Education Association, which agreement sets the salaries for the petitioners for the 1984-85 school year;

4. Whether the petition should be dismissed because it was not filed within the ninety-day limitations period set forth in N.J.A.C. 6:24-1.2;

5. Whether petitioners are guilty of laches;

6. Assuming arguendo that the Bergenfield Education Association has breached its responsibilities, fiduciary or otherwise, to petitioners, whether petitioners have any claim against the Board;

7. Whether petitioners are bound because of principles of agency by the actions of their legally designated bargaining representative, the Bergenfield Education Association;

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8. Assuming arguendo that the Board is ultimately found to be liable to petitioners, whether the Bergenfield Education Association must indemnify the Board for its liability; and

9. Whether the agreement on or about June 7, 1984, between the Board and the Bergenfield Education Association can be voided in the absence of any allegations that the underlying negotiations were in bad faith or fraudulent.

The respondent, Bergenfield Board of Education, filed a motion to dismiss the petition based on three grounds: first, that the Commissioner of Education lacks jurisdiction to invalidate a collective bargaining agreement; second, that the petitioners failed to answer interrogatories; and third, that petitioners have exceeded the 90-day statute of limitations contained within N.J.A.C. 6:24-1.2. The third party respondent, Bergenfield Education Association, filed a motion to dismiss the petitioners' petition based on three grounds: First, that the petitioners have exceeded the 90-day statute of limitations contained within N.J.A.C. 6:24-1.2; second, that the Commissioner of Education lacks jurisdiction to hear the instant case, which is controlled by the New Jersey Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq; and third, that the third-party petitioners failed to state a claim because there is no legal basis for its claim for indemnification.

Briefs and appendixes in support of the motion to dismiss the petition and in opposition thereto were timely filed. No oral argument was requested by any party.

The movants-respondents, Bergenfield Board of Education and the Bergenfield Education Association, jointly urge the dismissal of petitioners' petition and strict adherence to the limitation of actions set forth in N.J.A.C. 6:24-1.2 which provides as follows:

> To initiate a proceeding before the commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.

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New Jersey courts have established that the accrual of a cause of action commences when the right to institute and maintain a suit first arose upon knowledge of the injury; or in this specific set of circumstances the time when each petitioner was notified or had knowledge that he or she was being placed on the first step of the professional salary guide for the 1984-1985 academic year. See, Rosenau v. City of New Brunswick and Worthington Gamon Meter Co., 51 N.J. 130, 137 (1968); Burd v. New Jersey Telephone Co., 149 N.J. Super. 20, 30 (App.Div. 1977) aff'd, 76 N.J. 284 (1978).

In the instant case it is factually undisputed and I so FIND for the purposes of this motion to dismiss that:

(1) All petitioners knew on May 18, 1984 that the Bergenfield Board of Education and The Bergenfield Education Association had reached a tentative collective bargaining agreement that placed them on the first step of the professional salary guide.

(2) All petitioners knew by June 5, 1984 that the collective bargaining agreement that had been ratified by the Bergenfield Education Association placed them on the first step of the professional salary guide.

(3) The petitioners' petitions were filed with the Commissioner of Education on February 15, 1985, over eight months after petitioners had knowledge of their placement on the first step of the professional salary guide.

It is clear that a petition challenging placement on a professional salary guide is subject to the 90-day bar. See, North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984); Stockton v. Board of Education of Trenton, ____S.L.D.____ (State Bd. of Ed., April 3, 1985) and Baker v. Board of Education of Clifton, ____S.L.D.____ (Commissioner's Decision, October 18, 1985).

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Both the Commissioner of Education and the courts have taken a firm position in regard to petitioners' failures to comply with N.J.A.C. 6:24-1.2. The New Jersey Supreme Court has ruled that a teacher must file a petition within 90 days of his or her receipt of notice of a Board's decision which affects him (such as withholding of an increment), and that a teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. Board of Education Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 326-327 (1979) In accord, Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App. Div. 1980), wherein Riely's petition of appeal was out of time because she had utilized arbitration machinery and waited more than a year from the date of the Board's action before filing her petition with the Commissioner. See also, Miller v. Morris School District, ___S.L.D.___ (Commissioner's Decision, February 25, 1980), where the Commissioner held that the petition would be dismissed as untimely because that petitioner failed to file her petition until nine months after she was notified she would not be reemployed as a nontenured teacher.

However, before dismissing the petition I must consider whether the provisions of N.J.A.C. 6:24-1.19 should be applied because strict adherence to the 90-day rule in this case might be inappropriate, unnecessary or result in injustice. The Commissioner has determined in recent decisions that the relaxation rule is to be applied sparingly. See, Kallimanis v. Board of Education Carlstadt-East Rutherford Regional High School District, ___S.L.D.___ (Commissioner's Decision, September 26, 1980). In the instant case, I am not persuaded by petitioners' arguments in their brief or a review of the circumstances of this case that the 90-day bar should not be applied. No equitable grounds or meritorious factual explanations have been raised that would mandate the inapplicability of N.J.A.C. 6:24-1.2.

Accordingly, it is **ORDERED** that the motion of the the Bergenfield Board of Education and the Bergenfield Education Association to dismiss the petitioners' petition is granted; and

It is further **ORDERED** that petitioners' petition is **DISMISSED.**

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

2.20.86
DATE

TIMOTHY N. TUTTLE, ALJ

Receipt Acknowledged:

FEB 27 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 25 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

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MARTHA BERTISCH ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD,	:	DECISION
RESPONDENT, THIRD-PARTY PETITIONER,	:	
V.	:	
BERGENFIELD EDUCATION ASSOCIATION, BERGEN COUNTY,	:	
THIRD-PARTY RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioners within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Petitioners argue that the applicability of N.J.A.C. 6:24-1.2 must be viewed within the context of the extensive litigation found in Bergenfield Education Association v. Bd. of Ed. of the Borough of Bergenfield, 1981 S.L.D. 567; aff'd in part, rev'd in part State Board 1982 S.L.D. 1440, rev'd in part and rem'd to the Commissioner by the N.J. Superior Court, Appellate Division May 19, 1983; decided by the Commissioner on remand January 10, 1985, which involved the same issues as herein and other case law wherein the 90-day requirement was not applied.

Upon review of the record, it is undisputed that each petitioner knew by June 1984 that he/she would be offered employment on a full-time, contract basis, as opposed to hourly wage, and that "[w]hen and if positions become available employment will be at step one of the salary agreement, at their proper degree level." (Memo of Agreement between the Board and Association, June 7, 1984, Exhibit C of Board's Brief in Support of Motion for Summary Dismissal) The Petition of Appeal was not filed until February 15, 1985 which is well in excess of the 90-day filing requirement of N.J.A.C. 6:24-1.2. Thus, despite petitioner's arguments to the contrary, the appeal is time barred. North Plainfield, supra; Baker, supra; Rita Conner et al. v. Bd. of Ed. of River Vale, decided February 18, 1986; Pohala v. Bd. of Ed. of Buena Regional, decided April 10, 1985, rev'd State Board October 16, 1985; Paul Gordon v. Bd. of Ed. of Passaic, decided by the Commissioner October 31, 1983, aff'd in part/rev'd in part State Board March 6, 1985

The fact that the litigation in Bergenfield, supra, did not result in a Commissioner decision until January 1985 does not serve in any way to absolve petitioners from meeting the 90-day filing requirement. None of them is a party or subject to the relief ordered in that matter. Further, contrary to petitioners' characterization, the issues therein are not the same as in the instant matter for, in the prior matter, petitioners were not recognized as tenure eligible.

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Therefore, the Commissioner adopts the recommended decision of the Office of Administrative Law dismissing the petition based on failure to meet the requirements of N.J.A.C. 6:24-1.2 for the reasons expressed therein.

COMMISSIONER OF EDUCATION

April 10,1986

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MARTHA BERTISCH ET AL.,

PETITIONERS-APPELLANTS,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BERGENFIELD, BERGEN COUNTY, RESPONDENT/THIRD PARTY PETITIONER-RESPONDENT,

V.

BERGENFIELD EDUCATION ASSOCIATION, THIRD PARTY RESPONDENT-RESPONDENT.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 10, 1986

For the Petitioners-Appellants, Aronsohn and Springstead (Harold N. Springstead, Esq., of Counsel)

For the Respondent Third Party Petitioner/Respondent-Respondent, Greenwood and Sayovitz (Clement H. Berne, Esq., of Counsel)

For the Third Party Respondent-Respondent, Zazzali, Zazzali and Kroll (Kenneth I. Nowak, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 3, 1986

Affirmed N.J. Superior Court June 15, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

PARTIAL INITIAL DECISION
OAL DKT. NO. EDU 5820-85
AGENCY DKT. NO. 293-8/85

JOYCE MALLEY,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF PEQUANNOCK,
Respondent.

Joyce Malley, petitioner, pro se

John Fiorello, Esq., for respondent (Hoffman & Fiorello, attorneys)

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

Joyce Malley filed two claims against the Board of Education of Pequannock in August 1985. She alleged that the Board had no reasonable basis for denying her an increment for the 1985-1986 school year. Secondly, she claimed that the Board was illegally denying her sick pay pursuant to N.J.S.A. 18A:30-2.1 for a work-related accident to her wrist on January 9, 1985, during the period on and after March 27, 1983, on various dates between then and the end of the school year in June 1985. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on September 16, 1985.

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Petitioner requested an interim relief hearing which was held on September 26, 1985 and was followed by a prehearing. The motion for interim relief was denied for reasons stated in my prehearing order dated October 1, 1985 which is incorporated herein. Because the sick pay allegation and petitioners' indication that she continued to be affected by her work-related injury, the prehearing order contemplated a notice to submit to physical examination (Point XV) between November 1 and November 15, 1985. A discovery schedule was included in the order.

Respondent moved to compel a physical examination. My order dated November 8, 1985 compelling discovery sets forth findings and conclusions and is fully incorporated herein. Inter alia, that order notes that, though urged to do so, petitioner declined to obtain advice of counsel. I ordered petitioner to submit to physical examination by Dr. Barnes (The workers compensation physician for the Board), to submit her home telephone number to me so that she could be reached, to reply to interrogatories and submit to depositions and to appear before me on November 18, 1985 to resolve any outstanding discovery issue and determine trial readiness and sanctions if any.

On November 15, 1986, I again ordered petitioner to comply with discovery, making additional findings concerning her wilful refusal to submit to physical examination by Dr.Barnes and her belief that she was not obligated to do so because any continuation causes from the last school year would be in her next petition of appeal for 1985-86. I explained the reasons for compelling discovery, at length, mindful of the fact that petitioner was not represented by counsel. My order of November 15, 1985 is incorporated herein.

A hearing to resolve discovery problems was held on November 18, as a result of which I modified and supplemented my prior orders by another order compelling discovery on November 18, 1985, which is incorporated herein. At this point, the failure of petitioner to comply with discovery forced an adjournment since the Board had received hardly any of the discovery requested. Hearings were rescheduled for March 10, 12, 13 and 14, 1986. My order of November 18, 1985 required that petitioner submit to deposition, to physical examination by Dr. Effron and submit more responsive answers to interrogatories.

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On January 3, 1986, the Board filed a motion to dismiss for failure to comply with prior discovery orders and to bring documents and respond to questions at deposition. These new matters are contained in respondent's affidavit at paragraphs 18 through 23. On February 21, Mrs. Malley called my secretary and advised that she would not be able to attend the hearing past 2 p.m. on March 14, 1986 because she had to go to the unemployment office. On February 19, petitioner wrote to this office stating she would need no witnesses and that the resolution withholding her increment was based in part on charges the resolution found lacked sufficient documentation to sustain.

I FIND:

1. Petitioner failed to appear at Dr. Effron's office for an appointment on December 10, 1984 at 4 p.m. after notice sent to her to do so on November 21.

2. Petitioner, after notice to do so, failed to bring all existing documents to deposition, refused to authorize the release of Dr. Rosenwasser's report, and did not answer responsively to all interrogatories, including Number 21.

3. Both at deposition and in interrogatories, petitioner's answers were often argumentative, incomplete, less than candid and included allegations that the Board's witnesses would be liars, although both Mrs. Malley and her husband had been advised from the bench on prior occasions that such characterizations were improper.

4. Despite being ordered to do so, petitioner continued to refuse to answer questions concerning her medical condition on any date after June 10, 1985 (Transcript 133-139, attached hereto).

5. Petitioner never supplied her home telephone number as ordered.

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Discussion and Conclusions

The Board's reasons for increment denial were excessive absenteeism, uncooperative attitude and unsatisfactory performance. Respondent has supplied a copy of petitioner's deposition. Petitioner's responses on the excessive absenteeism issue are illustrative of her approach to deposition. See November 25, 1985 transcript, pages 57-61, 68-80. When refusing to answer any questions concerning her medical treatment and condition after June 10, 1985, petitioner wilfully ignored my rulings that, since she indicated that the results of her work-related injury in Janaury 1985 persisted and continued into the 1985-86 school year, such information was relevant to her sick pay claim and had to be divulged in discovery. Despite my ruling, petitioner insisted that she would answer only questions related to events in the 1984-85 school year in which the accident occurred since any absences in the 1985-86 school year for which sick pay was denied would be claimed in a new petition for that year.

Other than the claim that any absences in the 1985-86 school year were required to be considered in a new petition, petitioner advanced one other reason why the requested medical information was irrelevant. She took the position that N.J.S.A. 18A:30-2.1 required that the Board pay her for any absences which she alleged stemmed from the accident arising out of her employment without the need for her to prove that she was disabled and unable to work on those days. Petitioner continued to espouse this position although forewarned by my order of November 8, 1985 that our appellate division has held that language of the statute has precisely the same meaning as it does in the context of the workers compensation act. Theodore v. Dover Bd. of Ed. 183 N.J. Super. 407 (App. Div. 1982).

Petitioner would have to present proofs that she was disabled as a result of her wrist injury in January 1985 from working on March 27, 1985 and on subsequent dates, since sick leave cannot be claimed by a nondisabled teacher. N.J.S.A. 18A:30-1; Matters of Hackensack Bd. of Ed., 184 N.J. Super. 311 (App. Div. 1982). Through the course of prehearings, interrogatories and the deposition, petitioner has not revealed any proofs: she does not propose to call any physician witness (or any witnesses), she "may have had"

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pain in her wrist on some days she was absent and she saw physicians on other days she was absent. Thus in the discovery which has been fully revealed as a result of the several motions to compel and to dismiss, there is no indication of any proofs of her claim for sick pay, and if petitioner attempted to present new proofs not revealed in discovery, they would be barred.

In this stance of the case, I have no hesitation in dismissing the sick pay claim. While not determining the merits, petitioner's case has been sufficiently revealed to persuade me that fundamental fairness is not offended by dismissal even though petitioner is pro se. Petitioner retains her workers compensation claim in that jurisdiction. Further, early on in these proceedings, I suggested that petitioner amend to add sick pay claims, if any, stemming from the same episode, which she may have incurred in the 1985-86 school year. She declined to do so, insisting that all such claims, even if stemming allegedly from the January 1985 injury, would become the subject of a new petition. Under the single controversy doctrine, which precludes multiplicity of litigation, petitioner is not permitted to split claims stemming from the same incident on the basis of school years. Petitioner must seek complete relief in one proceeding for vindication of the wrong charged. Mori v. Hartz Mountain Development Corp. 193 N.J. Super.47, 53 (App. Div. 1983). Such doctrines are applicable to administrative proceedings. Hackensack v. Winner, 82 N.J. 1, 31 (1980). The futility of going through a similar proceeding and discovery disputes with respect to additional days in the fall of 1985, stemming from the wrist injury in January 1985, is obvious.

Pursuant to N.J.A.C. 1:1-3.5(a) and (b), for unreasonable failure to comply with the order of a judge, and for obstructive behavior pursuant to N.J.A.C. 1:1-11.6(b), I **CONCLUDE** all claims for sick days on and after March 27, 1985 allegedly stemming from the work-related injury in January 1985 must be dismissed, including any such claims for sick days for the same cause both in the 1984-58 and the 1985-86 school years.

It is therefore **ORDERED** that petitioner's claim to sick pay be **DISMISSED**.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 26, 1986
DATE

Naomi Dower-LaBastille, ALJ

FEB 28 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

FEB 28 1986
DATE

Mailed to Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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JOYCE MALLEY,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNNOCK, MORRIS COUNTY,	:	
RESPONDENT.	:	
	:	

The record and partial recommended decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4 a and b.

Upon review of the record and the exceptions filed by petitioner, the Commissioner adopts the recommended partial initial decision of the Administrative Law Judge for the reasons contained therein. There is nothing presented by way of exceptions to persuade the Commissioner that the ALJ erred in her determination to dismiss petitioner's sick pay claim.

COMMISSIONER OF EDUCATION

APRIL 14, 1986

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JOYCE MALLEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, April 14, 1986

For the Petitioner-Appellant, Joyce Malley, pro se

For the Respondent-Respondent, Hoffman and Fiorello, (John Fiorello, Esq., of Counsel)

The State Board affirms the decision of the Commissioner of Education for the reasons expressed therein.

August 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5820-85
AGENCY DKT. NO. 293-8/85

Joyce Malley,
Petitioner,
v.
BOARD OF EDUCATION OF TOWNSHIP OF PEQUANNOCK,
Respondent.

Joyce Malley, petitioner, pro se

John Fiorello, Esq., for respondent (Hoffman & Fiorello, attorneys)

Record Closed: April 1, 1986 Decided: April 28, 1986

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

Joyce Malley filed two claims against the Board of Education of Pequannock in August 1985. She alleged that the Board had no reasonable basis for denying her an increment for the 1985-1986 school year. Secondly, she claimed that the Board was illegally denying her sick pay pursuant to N.J.S.A. 18A:30-2.1 for a work-related accident to her hand on January 9, 1985, during the period on and after March 27, 1985, on various dates between then and the end of the school year in June 1985. The matter was transmitted to the Office of Administrative Law for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on September 16, 1985.

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Petitioner requested an interim relief hearing which was held on September 26, 1985 and was followed by a prehearing. The motion for interim relief was denied for reasons stated in my prehearing order dated October 1, 1985 which is incorpoated herein. Because the sick pay allegation and petitioner's indication that she continued to be affected by her work-related injury, the prehearing order contemplated a notice to submit to physical examination (Point XV) between November 1 and November 15, 1985. A discovery schedule was included in the order.

Respondent moved to compel a physical examination. My order dated November 8, 1985 compelling discovery sets forth findings and conclusions. Inter alia, that order notes that, though urged to do so, petitioner declined to obtain advice of counsel. I ordered petitioner to submit to physical examination by Dr. Barnes (the workers compensation physician for the Board), to submit her home telephone number to me so that she could be reached, to reply to interrogatories and submit to depositions and to appear before me on November 18, 1985 to resolve any outstanding discovery issues and determine trial readiness and sanctions if any.

On November 15, 1985, I again ordered petitioner to comply with discovery, making additional findings concerning her wilful refusal to submit to physical examination by Dr. Barnes and her belief that she was not obligated to do so because any continuation causes from the last school year would be in her next petition of appeal for 1985-86. I explained the reasons for compelling discovery, at length, mindful of the fact that petitioner was not represented by counsel.

A hearing to resolve discovery problems was held on November 18, as a result of which I modified and supplemented my prior orders by another order compelling discovery on November 18, 1985. At this point, the failure of petitioner to comply with discovery forced an adjournment since the Board had hardly received any of the discovery requested. Hearings were rescheduled for March 10, 12, 13 and 14, 1986. My order of November 18, 1985 required that petitioner submit to deposition, to physical examination by Dr. Effron and submit more responsive answers to interrogatories.

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On January 3, 1986, the Board filed a motion to dismiss for failure to comply with prior discovery orders and to bring documents and respond to questions at deposition.

On February 12, petitioner filed a statement that she would need no witnesses and that the resolution withholding her increment was based in part on charges which the Board found lacked sufficient documentation to sustain. On February 26, 1986, I granted the motion for summary judgment in part, dismissing the sick pay claim for petitioner's unreasonable failure to comply with discovery orders. My findings and conclusions on the motion are incorporated herein. The Commissioner affirmed dismissal of the sick pay claims on April 14, 1986.

Hearings were begun on the increment denial issues on March 10, 1986. During the lunch break petitioner sent a message that she was ill and would not be returning after lunch. I adjourned the hearing and sent petitioner a telegram directing her to advise whether or not she would appear on March 12, 1986, the next scheduled hearing date. She responded that she would. At my request, the Board had gone forward with the burden of producing evidence of the alleged reasonable basis for increment denial. At the conclusion of its presentation on March 12, 1986, petitioner declined to testify, although she was invited to do so if she wished to controvert any of the testimony of Board witnesses. Thus the hearings concluded on March 12 and the dates of March 13 and 14 were adjourned. A list of the exhibits introduced into evidence is attached to this decision. The last brief was filed on April 1, 1986, when the record closed.

DISCUSSION OF TESTIMONY

The Board presented its Superintendent, Frank E. Kaplan; the high school associate principal, Dr. Mary E. Tamanini; Robert N. Tilli, the high school mathematics department chairman and Ralph M. Rizzolo, the high school principal. Kaplan drafted a recommendation to the Board to deny petitioner's increment for the 1985-86 school year and articulated the basis for denial. Since petitioner is a high school mathematics teacher, the witnesses from the high school were more familiar with her work and testified concerning the allegations of uncooperative attitude and poor classroom performance. All the witnesses testified concerning the deleterious effect of petitioner's

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excessive absences on her students' educational program.

After the hearing record for the taking of testimony, cross examination and submission of exhibits was closed, petitioner filed a "brief" which included numerous items of factual testimony (and some exhibits) which would have been cognizable had she testified and submitted herself to cross-examination at the hearing. The effect of permitting such material to come in after the close of the hearing record would be to deny the Baord its statutory right to cross-examination. I CONCLUDE that all such facts from petitioner's brief which do not appear in the testimony and exhibits duly entered into evidence at the hearing must therefore be stricken from the "brief" and cannot support any findings. In fact, it is clear to me that petitioner placed her testimony in brief form specifically to avoid the rigors of cross-examination.

Since the Board's testimony is uncontroverted, further discussion of it is not required. Only the operative findings of fact will be related below.

FINDINGS OF FACT

1. On May 20, 1985, the superintendent of schools recommended that Joyce Malley's increment be denied for 1985-86 school year, denominating the basis for his recommendations as ten "charges."

2. Malley was invited to attend a closed session on June 3, 1985 to respond to the charges, was advised on May 30 that additional recent absences would be considered, and attended the closed session with her NJEA respresentative to respond to the proposed Board action on June 3, 1985.

3. The Board, by unanimous resolution on June 10, 1985, denied Malley an increment for 1985-86 but provided that she would be placed back on the regular guide for 1986-87 if her absenteeism problem had been corrected, her attitude improved and her performance had been satisfactory in 1985-86 school year.

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4. The reasons adopted by the Board and the facts underlying them were expressly set forth in the resolution. They were: excessive absences despite several warnings on 24 days and 13 occasions in 1984-85 (not including absence for a school related injury between January 9 and March 26, 1985) and absences which ranged from 10 to 44 each year, totalling 139 sick days between September 1975 and June 1984; an uncooperative attitude reflected in continuing refusal to submit her home phone number, a failure to administer a quarterly examination in November 1984 and a belligerent and negative attitude toward evaluations and unsatisfatory classroom performance in 1984-85, especially in April and May 1985.

5. The Board adopted a staff attendance policy in March 1983 which set up procedures for determining excessive absenteeism and defines occasions of absence as follows excluding absences for required court appearance, religious holidays, death in family and administrative requests:

one-day absence	one occasion
one full week absence -	one occasion
two days in a row -	one occasion
Friday and Monday -	two occasions

6. The Board, through various administrators warned Malley in writing on the following occasions of concern over excessive absences:

> June 14, 1985 "This year Mrs. Malley was absent a great deal, due largely to family illness and the death of her father. Currently, Mrs. Malley is on a personal leave of absence from April to the end of June. She expects to return to school in September 1978 and resume full-time teaching. Her extended absences have resulted in the hiring of substitutes and currently, Mrs. Vander Have, who is filling in for the remainder of the year." (R-8).

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December 15, 1982 "Please let me state at the outset, that I am very sorry about your illnesses and misfortunes this year. However, I am becoming increasingly concerned about your students not having their regular teacher over a period of time. Your initial illness kept you away from school until November 8th. Due to the death in your family, you were then out for three additional days in November. This week because of illness, you have been absent three days, thus far. Needless to say, it has become increasingly difficult to obtain any substitute, let alone the same substitute, to offer your students any continuity.

I hope your health improves to the degree that you can return to school, but I do feel, that I will need a doctor's verification that your health is sufficiently improved to withstand the rigors of a daily school routine." (R-9)

December 21, 1982 observation report: "Due to the discontinuity of instruction over the first two marking periods, please build into your overall plans some type of review . . .. It is imperative that both of your classes in Algebra I do not lose more time in this critical subject area." (R-10, last page).

January 4, 1983 "Although we met briefly before the Christmas holiday about your attendance record to date and related matters . . . I am asking you to attend a meeting on . . . January 7. " (R-11)

April 28, 1983 "Ms. Malley's attendance to date: 42 illness days and 3 death in the family days. The bulk of the 42 days came when Ms. Malley had a serious operation and recuperation time was necessary . . . Ms. Malley is fully aware that her daily attendance is important to her students' success." (R-12)

May 11, 1984 "Fourteen years at high school

Sabbatical - 1981/82
1982/83- 42 days absent (operation and illness)
1983/84 - 6 days ill/2 days personal absence (8 occasions)

Mrs. Malley had ten sick days remaining as of September 1983. She has used six sick days to date, leaving four unused. As a fourteen year experienced teacher, she had a total of one hundred forty sick days, with only four left as of this date. In other words, she has utilized over 95% of her sick days with less than 5% unused.

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Mrs. Malley and I have conferred, unofficially, before and I have been satisfied to the legitimacy of her illness on said days of absence. However, my main concern is over the number of days absent for Mrs. Malley. She is a teacher of mathematics - a demanding discipline. Additional difficulties are added to her task of instruction by absences. Absences mean substitute teachers and precious loss of class time with the regular teacher.

Mrs. Malley can expect to be asked for doctor's notes for any further absences this year. It is hoped that this conference was helpful and that her attendance will improved." (R-13)

May 25, 1984 "Attendance (1983/84) - six days ill, two days personal absence or eight occasions. There is a concern over the number of days absent and their effect upon her classes. It is hoped that the conference regarding absences will help in improved attedance for the future." (R-14)

7. In 1984-85, Malley was absent on October 11, 16, 22; November 14, 28; December 12 and January 8, a total of 8 days on 7 different occasions.

8. On January 9, Malley sustained an injury to her hand when a student slammed a door into it; she was absent due to this work-related injury from January 10 through March 26, 1985, when the Board's workers compensation physician certified that she could return to work.

9. On January 23, 1985, the superintendent wrote to Malley to convey a grave concern over the status of her math classes "which stems from an apparent lack of communication between you and the high school." He complained that corrected mid-term exams had not been sent to the school and Malley had refused to provide her home phone number. He expressly directed her: "Insofar as this particular absence is concerned, you are required to submit in person or through the mail, a physician's letter, no later than February 1st, indicating the nature of your disability and your apparent inability to be in the classroom."

10. Malley did not supply a physician's note meeting this specification.

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11. After Dr. Barnes, the Board's physician said she would return to work on March 27, 1985, Principal Rizzolo asked Malley to get a release from her physician so that she could come back to work immediately.

12. Malley did not visit her physician and get a note from him until April 15 and did not return until after that date, thus incurring an additional eight days of absence (March 27, 28, 29, April 1, 2, 3, 4, 15).

13. Dr. Barnes found nothing orthopedically wrong with Malley's left hand and she produced no physician's specification of her injury and disability in this record; at the hearing it could be observed that Malley was right-handed.

14. On April 25 and 26, 1985, Malley was again absent, despite a strong note on her evaluation report dated April 16, 1985 concerning excessive absences.

15. On April 30, 1985, Principal Rizzolo conferred with Malley concerning her ten occasions of absence in 1984-85 (not including the workers compensation excused period) (R-16). On May 1, he wrote to Malley on the same subject and mentioned the possiblity of increment withholding.

16. On May 1, Malley took a personal day; on May 28, 30 and 31 she was absent for "illness." On June 4 and 5, 1985, she again claimed illness as the reason for her absences. Nowhere in the record is there any physician's certification specifying the nature of her illness and disability on these days.

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17. The adverse effects of Malley's excessive absenteeism showed up very clearly to her superiors and were illustrated statistically by comparisons of grades of the students of Malley and the other math teachers (P-19A and B); 50% of Malleys' students failed.

18. Parents and students came to Principal Rizzolo in the late spring of 1985 and asked to stay with the teacher reassigned to these students stating that they wanted a teacher who would be there every day.

19. There was a longstanding practice in the math department to give quarterly examinations to monitor the progress of academic mathematics classes which Malley was aware of and had complied with until the Fall of 1984.

20. Late in 1984, math chairman Tilli came to Malley to obtain the November quarterly exam grades of her probability and statistics class, but these were not available. When asked why not, Malley stated she did not have time to give the exam, there was not enough time to do the work in school and she would not take any work home.

21. The administration directed all teachers to supply their home telephone numbers and Rizzolo made an effort to get them in 1982-83, and 1983-84. By 1984, Malley was the only teacher who had refused to supply her phone number, claiming that it was private.

22. Malley supplied her mother's telephone number, but when the principal called to seek lesson plans, examination results and a date when she might return during her long absence in early spring of 1985, Malley's mother said the school was harassing her daughter and hung up. Five minutes later, Malley's husband called back and said he would deliver the corrected exams to another teacher's home to be brought to the school.

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23. Superintendent Kaplan wrote to Malley on January 23, 1985, asking her to submit her home telephone number, but she refused to do so.

24. Due to the inability to communicate with Malley during her absences, the high school administration was unable to obtain necessary lesson plans and progress reports on her students for the use of substitutes, short of asking substitutes to visit her home which was too much to expect.

25. Math chairman Tilli explained that due to the nature of the subject, learning mathematics is sequential and cumulative and the loss of continuity of instruction hindered the students from moving along in courses such as algebra and geometry, so that additional review work had to be built in. He stated there was so much time lost in 1984-85 in Malley's classes that it was very bad for the students.

26. After the incident when Tilli asked Malley for the quarterly exam grades and she said she didn't have time to give them and said "why should I take home papers?" she walked past him on the way home and lifted her hands up to show "look no papers," while looking at the other teachers carrying papers.

27. When Malley returned to school in April 1985, Rizzolo and Tilli made additional observations of her teaching because they had received a number of complaints. They found looseness of discipline, students talking, confusion, waste of teaching time and, when bringing these matters to Malley's attention, Malley's response was, "show me how to become a better teacher," but this was always said in a way as to clearly mean that the administrators were unable to teach Malley anything.

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28. The first marking period of Algebra II is mostly review of Algebra I and Malley's absences early in the fall of 1984 (10 days) were excessive and deleterious to her classes. Tilli added that Malley was super uncooperative for the last year or so (1983-84 nd 1984-85). She did not put enough effort into preparation and teaching and appeared to think the job was a joke, although this was not true in the early years. Tilli had known Malley's teaching for 14 years.

29. The high school administrators met with Malley on April 30, 1985 to impress on her the seriousness of her excessive absences and work performance; she told them that if she had to take days off for any reason she was going to do it, and, in fact, she did take more days off before the end of the year although she had been advised on May 1, 1985 that her increment might be withheld. On May 1, Malley took a personal day and she claimed illness as the reasons for her absences on May 28, 30, 31 and June 4 and 5, 1985.

30. Malley was absent for 150 days on account of illness and 35 for personal reasons between September 1975 and June 1985; excluding 1981-82 when she was on leave of absence and excluding the months (January to March 1985) when she was absent due to a work related injury.

30. Malley's observation and evaluation reports noted deficiencies and areas in need of improvement on April 16, April 23, April 30, may 14, May 16 and May 20, 1985. She was rated unsatisfactory for 1984-85.

The issue in all increment withholding cases is whether or not the Board had a reasonable basis for its action. Bd. of Ed. of Bernards Tsp. v. Bernards Tsp. Ed. Ass'n, 79 N.J. 311, 321 (1979). Petitioner was advised of the legal standard both orally and by the prehearing order. Excessive absenteeism alone has been held to be good cause for withholding an increment when it causes discontinuity of instruction and negatively

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impacts on the students' learning process. Trautwein v. Bd. of Ed. of Bound Brook, (N.J. App. Div., April 8, 1980, (A2773-78) unpublished) cert. den. 84 N.J. 469 (1980). The legal precedents sustaining excessive absenteeism as a reason for increment withholding and even termination were also related to Malley both orally and in writing through my prior decisions on motion in the record.

Notwithstanding the articulated legal precedents and issues in the case, petitioner's arguments are principally addressed to nonissues, namely the alleged negligence of the Board and administration leading to injury of her hand in January 1985 and the alleged "defective charges" in the superintendent's draft recommendation and Board's resolution withholding Malley's increment. Although the superintendent termed the reasons he recommended increment withholding as "charges," presumably because the Board might wish to seek either dismissal or increment withholding, for the latter sanction, a statement of reasons rather than "charges" is all that is required. Nor is it necessary for a Board to accept every reason specified by the superintendent for his recommendation. Indeed, a teacher may convince the Board in the course of her informal hearing before them, that some of the reasons are insufficient, duplicative, or should be subsumed within other reasons, as occurred in this case.

For example, the superintendent's draft (No. 4), listed "unauthorized leave taken by you on April 1, 2, 3, 4, 15 and 25, 1985." The Board found "insufficient documentation" to sustain this charge. It did, however, find as a part of excessive absenteeism, that Malley was absent on March 27, 28, 29 and April 1, 2, 3, 4 and 15, 1985 after Dr. Barnes had certified there was nothing wrong orthopedically with Malley's hand and that Malley had not supplied specific medical certification, as required and requested, for these absences, but instead supplied a physician's note stating that she was "sufficiently recovered from her illness and is able to return to work on Tuesday, April 16."

Similarly, the superintendent's draft (No. 7) listed Malley's failure to give a quarterly exam to her class in November 1984 as insubordination and (at No. 8) listed failure to return exam papers and get grades in on time in January 1985 as a separate reason, but the Board determined to subsume her failure to give a quarterly exam as an

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underlying fact illustrating an uncooperative attitude and did not include the belated exam grades in January 1985 as a reason for increment denial. The latter incident illustrated a lack of communication which Malley's submission of her telephone number would have mitigated and it also contributed to her unsatisfactory performance as stated in the May 20, 1985 evaluation report (R-18) which formed one of the underlying facts in the Board's citing of lack of competence as a reason for denial.

Petitioner in her brief, repeatedly points to differences like those above, between the superintendent's draft and the Board's resolution as "defective charges" and then repeatedly states "no amount of substantiation can salvage a defective charge." Although she does not explain her definition of defective charge, it appears that she believes that any discrepancy between the draft of reasons prepared by the superintendent and the reasons and facts adopted by the Board in its resolution constitutes some defect. If such were the law, then if a teacher succeeded in convincing a Board at the informal hearing that even one incident related in the notice or draft should not constitute a reason for denial, or if the Board chose to articulate its reasons differently, the Board's increment denial must fail. This argument is illogical and without merit. In fact, there would be no reason to require an informal hearing before the Board if there were no expectation of the Board's being persuaded by the teacher to modify or adopt some, but not all of a superintendent's recommendations.

The purpose of requiring that the teacher be given notice of the reasons for the superintendent's recommendation is so that the teacher can prepare a presentation to the Board. It serves only a notice function and is in no way analogous to an indictment, for example. There is no requirement that the superintendent's recommendations be identical to the reasons which the Board articulates in its resolution. They are only required to give the teacher adequate notice and they did so in this case.

Petitioner makes a second argument that there is no such reason ("charge") as an uncooperative attitude because "attitude is unassessable." N.J.S.A. 18A:29-14 says that increments maybe withheld "for inefficiency or other good cause." The words "uncooperative attitude" chosen by the Board to describe such facts as Malley's refusal to

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give her home phone number, failure to give a quarterly examination, refusal to take work home to plan lessons or correct papers and general negative attitude toward the teaching modes suggested by administrators, must be viewed in light of the facts found, not their dictionary or theoretical meanings. **I CONCLUDE** the facts alleged and proved are good cause which may properly be considered in determining increment withholding under N.J.S.A. 18A:29-14.

Finally, the petitioner argues that when a collective bargaining agreement provides for a certain number of days as leave days annually with pay, such days taken by the teacher may not be counted in considering excessive absences. Petitioner never introduced a copy of the agreement into evidence. Instead she included a portion of it with her brief. This rationale has been implicitly rejected in the case law, however, by conclusions that increments may be withheld or tenure lost by excessive absence irrespective of the legitimate reasons for them. Trautwein, supra. In short, the negotiated contract controls whether or not a teacher will be paid for certain absences. It does not, and cannot control whether or not an increment may be withheld when excessive absence has a deleterious effect on the education of children. Bd. of Ed. of Bernards Tp., at 320-324. Increment withholding is a managerial prerogative expressly granted to the local board by the Legislature and our highest court has ruled that the negotiated contract cannot control it. An increment is to reward only those who have contributed to the educational process. Id. 321.

Notice to Malley of the reasons for the Board's action was more than adequate. All the facts it intended to rely upon were alluded to and Malley was given supplemental notice in writing prior to the informal hearing that absences subsequent to the origional notice would be considered. All the underlying facts were proved. **I CONCLUDE** that the Board had a reasonable basis for withholding petitioner's increment and that the Board's action was not arbitary, without rational basis or induced by improper motives.

It is therefore **ORDERED** that the petition of Joyce Malley be **DISMISSED.**

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

April 28, 1986
DATE

Naomi Dower LaBastille
Naomi Dower-LaBastille, ALJ

MAY - 1 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAY 1 1986
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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JOYCE MALLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time requirements of N.J.A.C. 1:1-16.4a and b.

Petitioner asserts that the Administrative Law Judge erred in concluding that she exhibited a negative attitude. She reiterates her contention that attitude is intrinsically not assessable and that her attitude was not considered negative until her return from a work-related absence. Petitioner also asserts that her increment cannot be withheld because among other things (1) absenteeism related to nonelective major surgery or allowed under law and collective bargaining cannot be considered as part of excessive absenteeism; (2) excessive absenteeism was alleged only upon return from a work-related absence; and (3) the Board is attempting to blame her for alleged negative consequences on pupils which, she argues, would have been caused by the Board's failure to provide adequate substitute teaching.

Upon review of the record of this matter, including the parties' exceptions, the Commissioner concurs with the initial decision and adopts it as the final decision in the matter. The record more than amply supports that the Board had a reasonable basis for its action to withhold petitioner's increment. Further, there is nothing advanced in petitioner's exceptions to demonstrate that the ALJ erred in her conclusions or was otherwise incorrect in her analysis of the legal issues.

Accordingly, the Petition of Appeal is dismissed for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

June 4, 1986

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JOYCE MALLEY,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PEQUANNOCK, MORRIS COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, June 4, 1986

For the Petitioner-Appellant, Joyce Malley, pro se

For the Respondent-Respondent, Hoffman and Fiorello
(John Fiorello, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DOCKET NO. EDU 2772-85
AGENCY DKT. NO. 112-4/85

RICHARD A. VOLL AND
SALLY BRANDES,
Petitioners,

v.

BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY, AND SAMUEL STEWART,
Respondents.

Irving C. Evers, Esq., for petitioners
(Parisi, Evers & Greenfield, attorneys)

Louis C. Rosen, Esq., for respondent
(Aron & Salsberg, attorneys)

Record Closed: January 17, 1986 Decided: February 26, 1986

BEFORE **JAMES A. OSPENSON,** ALJ:

Richard A. Voll and Sally Brandes, residents and taxpayers of the Village of Ridgewood, Bergen County, alleged actions of the Board of Education of the Village of Ridgewood, Bergen County, in adopting a school reorganization plan on January 21, 1985

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for 1986-87 and a further reorganization plan at an open work meeting of the Board on March 25, 1985, were arbitrary, capricious and unreasonable (1) in that the Board merely voted to rubber stamp the superintendent's recommendations without adequate public discussion or opportunity for community input concerning the proposed reorganizations, in violation of N.J.S.A. 18A:7A-2(a)(5) and N.J.S.A. 18A:7A-2(a)(5); (2) in that action taken at the March 25, 1985 open work meeting was violative of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.; (3) in that the plans themselves were educationally unsound and discriminatory against certain pupils in the district; (4) in that one feature of the plans calling for pairing of principals at K-2 and K-5 schools was illegal, null and void because contrary to N.J.A.C. 6:8-4.3(c)(2); and (5) in that the Board and its superintendent otherwise violated provisions of the Open Public Meetings Act by meeting covertly to discuss proposals for reorganization. Petitioners demanded judgment the actions of the Board were arbitrary, capricious, unreasonable and should be set aside; and judgment, further, directing the Board to afford petitioners and other interested citizens opportunity to present viable educational alternatives to the proposals. The Board denied the allegations generally, contending petitioners failed to state timely claims upon which relief could be granted and contending the Board's actions were a reasonable exercise of its authority under N.J.S.A. 18A:11-1.

The petition of appeal was filed in the Bureau of Controversies and Disputes of the Department of Education on April 22, 1985. The Board's answer was filed there on May 13, 1985. Accordingly, the Commissioner of the Department of Education transmitted the matter to the Office of Administrative Law on May 15, 1985 for hearing and determination as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on July 17, 1985 and an order entered establishing, inter alia, hearing dates in the matter beginning October 21, 1985. Hearings were conducted on October 21, 22, 25, 28, 29, 30, and 31, 1985. Thereafter, time for posthearing submissions having elapsed, the record closed.

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As appeared from the prehearing conference order, paragraphs 2, 3, and 5, of the petition of appeal were admitted by the Board. Paragraph 4 was admitted in part and denied in part. At issue in the matter generally, it was established, were the following:

A. Whether action of the Board at the open work session on March 25, 1985 was violative of the Open Public Meetings Act and/or under general education law;

B. Whether Board approval of reorganization plans was arbitrary for want of opportunity for adequate public input before approval;

C. Whether the plans as approved were substantively arbitrary, capricious and unreasonable; and

D. Whether such feature of the plans as called for pairing of schools under one principal was unlawful as contrary to N.J.A.C. 6:8-4.3 for want of prior county superintendent's approval thereof.

EVIDENCE AT HEARING

I

The history of reorganization of Ridgewood schools may be said, at least for present purposes, to have had genesis as long ago as 1978, when a report by the then Commission on Fiscal Management reported on its investigation into problems of declining enrollment, continuing inflation, budget caps, and economic forecast into the 1980's. R-8. The Commission and various of its subcommittees considered projected enrollment that indicated school population would decline by approximately 1,000 students in the next five years, with a twenty percent drop at the elementary level, an eleven percent drop at the junior high level and a five percent drop at the senior level. R-8 at v. Among the Commission's stated purposes were to attempt to explore ways to maintain quality programs with reduced resources, to find new resources, and to reduce or eliminate existing programs or services that included the possibility of closing schools. Id. at 3.

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In 1983, the Board appointed 53 school and community members to an Enrollment Committee and charged it to define problems confronting the district in context of enrollment, to inform the community of the enrollment situation and future projections, to identify and define alternative courses of action to the district, to evaluate cost and benefits of each alternative, and to recommend proposed courses of action to the Board. In its report of May 1984 returned to the Board (P-3), among other recommendations, the Committee suggested reorganizing district schools into grade structures that would change the existing structures of K-6, 7-9 and 10-12 to K-6, 7-8, and 9-12 or K-5, 6-8 and 9-12. P-3 at 3. The Committee suggested the Board had the option of continuing to operate seven existing neighborhood elementary schools or closing two of the schools, one on the east side and one on the west side of the village. A month later, in its June 19, 1984 report, the Enrollment Committee clarified its recommendations to express specific preference for a reorganization plan in three components: (a) a four year high school 9-12, (b) two middle schools 6-8, and (c) K-5 elementary schools. P-2. One recommendation specifically was to close one or two elementary schools. The revised recommendation of the Enrollment Committee was a subject of discussion at a regular public meeting of the Board on July 6, 1984. R-46.

Newspaper publicity about the Committee report at the time was extensive and detailed. R-53, 54, 55. In December 1984, as reported in the press (R-56), the superintendent announced he planned to recommend to the Board a school reorganization district plan for a four-year high school, two middle schools 6-8, and three arrangements of seven then present K-6 elementary schools into grade K-5, a reorganization plan, it was said, originally suggested in the 1978 report of the Commission on Fiscal Management. R-56. From October 1984 through and after the end of the year, the school administration sent information to all staff concerning the superintendent's intended recommendations to the Board. R-9, 10, 12, 13, 14.

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Ultimately, at a public meeting of the Board on January 21, 1985 (P-1), the superintendent made a public statement to the Board on grade reorganization in the district (a written copy of his statement was incorporated at pages 120-4 of and was appended to the minutes (P-1)). The superintendent noted the Enrollment Committee in June 1984, a committee composed of 53 citizens and staff members, presented a final report to the Board. He noted the Committee endorsed the concept of accommodating students from other districts at secondary level and urged the Board to continue to pursue a sending-receiving relationship. He noted the report said that if the Board were unsuccessful in arranging a receiving relationship, it should consider reorganizing the district, a reorganization the Committee preferred to be undertaken as a K-5, 6-8 and 9-12 reorganization, with closing of one or two elementary schools. The superintendent made two recommendations to the Board at the January 21, 1985 public meeting: first, a reorganization for a four-year high school in the fall of 1986, and second, a continuation of study of an alternative proposal for converting to a three-year or two-year middle school. No specific proposal for disposition of lower elementary grades was made at the time. Reasons justifying his recommendations were incorporated in the statement. The Board unanimously approved the superintendent's recommendation for reorganization to the four-year high school in the fall of 1986 and resolved to continue study of alternative proposals for converting to a three-year or two-year middle school. The Board also approved a resolution to conduct a special public meeting on February 25, 1985 to consider reorganization to a middle school. P-1 at 112.

Minutes of the regular meeting of the Board on February 25,1985 (P-4) showed the superintendent, in a statement (R-61) prefatory to the extensive public discussion at the meeting that ensued, noted school enrollment in 1968-69 was 7,600 but that currently it was 4,857, was expected to decrease to 4,400 and was expected to decrease further by 1989. He noted the Enrollment Committee the previous year had recommended a district configuration of K-5, 6-8 and 9-12 and a closure of one or two elementary schools. The superintendent's first recommendation was reorganization into a K-5, 6-8 school system complementing the 9-12 configuration of a four-year high school as previously approved by the Board on January 21, 1985. For the first time, publicly, the superintendent

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recommended to the Board and those of the public present that no elementary school be closed but that for 1986 two elementary schools, Glen school and Hawes school, each become K-2 primary schools attached to Travell and Somerville K-5 elementary schools. Under the plan, kindergarten, first and second graders would attend Glen or Hawes schools and then be bused as third, fourth and fifth graders to attend Travell or Somerville schools. The measure would have the utility of avoiding closing or disposing of a school building. Thus, it was recommended, all buildings would remain open, well-maintained and in operation by rental of space for other than school purposes. The plan, it was urged, would achieve the purpose a school closing otherwise was intended to serve, a more efficient utilization of staff and facilities. When third, fourth and fifth graders transferred to other K-5 schools, they would then become part of a larger group of students at each grade level there. The plan would leave both K-2 schools open and would retain them as neighborhood schools within walking distance for younger children. The plan for the K-2 affiliated schools, it was said, was educationally sound and manageable. The result would be a total district configuration of a four-year high school, two 6-8 middle schools, and five strong K-5 elementary schools, with two K-2 primary units. Minutes of the February 25, 1985 meeting showed extensive public participation in a lengthy question and answer period. P-4 at 133-43, together with appendix of further questions and answers.

At a public meeting of the Board on March 4, 1985 (P-15), the Board resolved to waive school facilities rental fees for groups interested in holding public forums to discuss reorganization of the schools in all aspects. The Board announced that information flyers, issues of "Ridgewood Schools at Work," would be mailed to citizens in the district soon. It was also announced publicly that a meeting of Concerned Parents of Ridgewood was scheduled to discuss reorganization on March 5, 1985 at a local school.

At a public hearing on reorganization of the schools on March 11, 1985, Board members and administrative officers reviewed recommendations for reorganization with members of the public. P-16 at 144, 150. The hearing was lengthy.

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At an open work session of the Board on March 25, 1985, a special meeting of the Board, the Board resolved unanimously to approve the superintendent's recommendation to reorganize grades K-8 into two 6-8 middle schools, five K-5 schools and two K-2 primary schools at Glen and Hawes.

Thus, reorganization of the schools was approved by the Board in three components, following administrative recommendation, at two public meetings: component (a) of the reorganization, 9-12, was approved at the January 21, 1985 meeting; components (b) 6-8 and (c) K-5 with two elementary schools as K-2 were approved on March 25, 1985. P-1 and P-17.

II

Petitioner Richard A. Voll testified that he has resided in the Village of Ridgewood for eight years. He is an attorney employed by a major corporation and was an unsuccessful candidate for Board membership in 1985.

Shown Board minutes of executive or closed sessions during January and February 1985, (P-6, 7, 9, 10, 11, 12, 13 and 14), he said consideration of such minutes during discovery phases of this litigation was the first time he had ever seen such minutes nor, he added, had he ever before seen formal resolutions of the Board at public meeting declaring its intention to retire to executive or closed session.

He noted that at a Board open work session on March 4, 1985 (P-15), the public was not given a chance to participate or be heard at the meeting. Concerning a Board executive or closed session of the Board at Southampton, New York on October 27,1984, an occasion when the Board discussed reorganization (P-26), Voll said he was aware previously the Board had so met from minutes of the meeting contained in a packet of general information papers given to candidates for Board election. At a public meeting of the Board on February 25, 1985 (P-4), at which he was present and at which there was administrative recommendation for a K-2 primary school configuration for two

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elementary schools, for the first time, Voll said he had requested the Board give more time to consideration of that component of overall Board school reorganization proposals. The Board, he said, gave him no response. He noted the Board had only one or two questions of its superintendent at the time, whom he described as vague about school program and the effect of such configuration on program. He said the superintendent reported advantages to the configuration that included keeping schools open and being in response to community concerns not to deprive citizens of proximity to neighborhood elementary schools.

Voll reviewed the history of reorganization deliberations of the district generally, commencing with the Enrollment Committee report of May 21,1984 and its revision a month later on June 19, 1984. P-3, 2. He noted the Enrollment Committee make-up of different staff, lay people, and other groups totaling some 53 persons. As reported, he noted, the original components of the plan did not include primary K-2 schools in conjunction with elementary schools in a K-2, K-5 configuration. At the March 25, 1985 public meeting, he said, he never heard any discussion by Board members of the reorganization proposals. Before voting, each Board member spoke in general. The membership was then polled on a motion for approval, which passed. P-17. During the period from January to March 1985, Voll said, the superintendent came to Glen School at one occasion and addressed parents there. At the time, Voll said, there was no discussion of a primary K-2 configuration. He said he was aware of district enrollment figures having been in the process of decline over the years from 7,600 to a projected 4,800 at the present time and for the immediate future.

Petitioner Sally Brandes testified she is a resident and homemaker in the Village. She was once a teacher in a district elementary school where she taught in the talented and gifted program for a short time some three years ago. She holds an elementary instructional certificate.

At the present time, she said, Glen and Hawes schools are in K-6 configuration. There are five other elementary schools so configured. She first heard of a primary K-2

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configuration at the Board meeting on February 25, 1985. As presently established, she noted, Hawes and Glen schools each have their own principals. The new configuration for primary K-2 schools would involve a pairing of principals with their associated K-5 schools. Glen and Hawes schools, together with their associated K-5 schools, Somerville and Trevell, are located on the east side of town. She noted there was no similar such primary K-2 school proposed for the west side of town. Glen has approximately 175 students now; Hawes has approximately 203 in the K-2 configuration, the projection for Glen in 1986-87 is about 65 students; the projection for Hawes approximately 85 students. In both schools now, she noted, programs are regular and include art, gym, music, health and physical education. There is a range also of community affiliated programs like brownies and cub scouts as well as community school classes and band for fifth and sixth grade students. The projection for the primary K-2 schools, however, she said, appeared to give no indication that bands would be allowed. She feared students in such primary schools would have no time for participation in nor even time to hear school bands, since the bands would be in other elementary school.

Brandes' opinion as to the pairing of principals was that such a system was bad. Lack of a principal in the building, she felt, would lead to feelings of teacher isolation. She also felt the K-2, K-5 configuration would require busing of third graders in situations where no busing is presently needed.

Concerning the Board public meeting on March 11, 1985 (P-16), Brandes said two segments of parent groups in the community were each given 15 minutes to speak on the reorganization for K-2 K-5, 6, 8 versus 7-8 configurations. At the superintendent's invitation, she recalled, a principal from a New York school system spoke on the advantages of a 7-8 configuration. Individual citizens, she said, were given three minutes to address the Board and those present. The public in all was allowed some three hours and 15 minutes to be heard. In her view, minutes of the March 11, 1985 meeting in P-16 were a fair report of that which transpired at the meeting.

Petitioners rested.

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III

Called by the Board, William J. Cobb, who holds a doctorate in education administration, testified he has been assistant superintendent for secondary education, so employed by the Board for the past seven years. Before then, he was employed in the district as junior high school principal, assistant to an elementary principal and assistant to the superintendent. He taught in Travell elementary school in a K-6 configuration, which has been the case for the past 30 years. At one time, he noted, it had been used a K-2 or K-3 school, as had Hawes school in the 1960's.

Concerning the district reorganization plan in general, he said he had a major responsibility to work on it with other administrators in the district and so to advise the superintendent. He authored an outline of expected reorganization savings in August 1985 (R-1), which was reported to the Board in September 1985 and a preliminary outline for reorganization, as revised and submitted on May 17,1985. R-2.

Concerning the K-2, K-5 configuration for primary elementary schools, he said the proposal was first discussed with central office administrators some weeks before the Board meeting on February 25, 1985. Cobb identified a "letter" addressed to the superintendent on March 11, 1985 from the county superintendent. R-3. The "letter" was unsigned but Cobb noted the text had been dictated by the county superintendent to a Board secretary on that date. In the fourth paragraph of R-3, it was said:

> Your plan further calls for two primary schools. Not only do I endorse this plan philosophically, as I do the middle schools, but I have had experience administratively in such schools, and my wife is presently teaching in such an organizational structure. I support your proposal for pairing two schools administratively.

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Cobb identified R-4 as a signed letter from the county superintendent to the superintendent on October 17, 1985. Its text was the same as that in R-3 with the exception the last sentence of paragraph four read as follows:

> I support your proposal for pairing two school administratively and grant approval in accordance with N.J.A.C. 6:8-4.4(c)[sic].

Revised approval by the county superintendent, it was suggested at hearing, resulted from a recommendation by Board counsel.

Cobb identified R-6 as a March 1985 publication circulated in the district entitled "Ridgewood Schools at Work." On page 4, in question and answer form, appeared explanations and rationale for a K-2 primary school pairing with counterparts in K-5 schools.

R-9 in evidence, a memorandum from Cobb to administrators and principals on October 5, 1984, was prepared by Cobb to summarize arguments for and against the 6-8, 9-12 school configuration and was sent to Board members in the last week of October 1984. R-10 in evidence, a memorandum Cobb sent to the superintendent concerning grade reorganization on October 24, 1984, detailed a listing of advantages of the 6-8 configuration. It was prepared, Cobb said, to inform the superintendent about general conclusions of administrators. R-11, a reorganization chronology for 1984-85, detailed by calendar date various events beginning with the June 19, 1984 report of the Enrollment Committee and continuing through the March 11, 1985 special public hearing on reorganization. It noted the superintendent first recommended a K-2 primary school configuration to the Board on February 25, 1985. Minutes of the Board executive or closed session on February 22,1985 in P-13, however, showed the superintendent first told the Board of the primary K-2 configuration at that time.

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Board minutes of the organizational meeting on April 9, 1984 (R-16) contained, on page 127 as attachment A, an official notice of schedule of regular meetings for the Board beginning May 7, 1984 and continuing through June 17, 1985. The official notice contained the following:

> Official action may be taken at any of the above public meetings to hold an executive session to handle matters which by law may be discussed in closed session. Such matters include negotiations, personnel, security, real estate, litigation and investments.

Cobb described the practice of the Board as scheduling both public meetings and work sessions. Regular public meetings would permit public comment during the course of the sessions; work sessions would not normally entail public comment. Executive sessions, Cobb noted, were closed to the public.

Called by the Board, George A. Libonate testified he is assistant superintendent of schools and has so acted for five years past. He holds a doctorate in education curriculum and instruction. His professional experience included out of district appointments as curriculum coordinator, elementary principal, college instructor and elementary teacher. He served within the district as elementary teacher and as elementary principal. He has had experience in primary K-2 schools as principal.

In the Ridgewood reorganization program, he said, he took part in administrative deliberations and attended most meetings of the administration and its "cabinet." His particular responsibility was for the K-2, K-5 and 6-8 structuring. He attended meetings at elementary schools with the superintendent or staff and parents from the end of January 1985 through mid-February 1985. At such meetings, he said, the superintendent would present fiscal issues linking them to the Enrollment Committee report and suggestions for closure of one elementary school. The purpose of such meetings, he said, was to get community reaction to what the school administration recognized as a hot issue. Though community reaction differed depending upon the area in town where

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meetings were held, the general sense of such meetings was that people were opposed to closing any schools in their own particular area and were not especially concerned whether schools were closed in other districts. In the Glen and Hawes school districts, he said, sentiment was high not to close any schools.

Concerning a K-2, K-5 configuration, Libonate gave it as his opinion based upon experience and research that the operational configuration of schools has no impact on achievement and attitudes of school children. Libonate addressed a public meeting of the Board on March 11, 1985, noting that in looking at alternatives to closing the schools, the K-2 model seemed to be a good educational response, one that would disrupt fewer students than would closing of a school. P-16 at 146. Libonate also addressed the Board on the primary K-2 configuration at the February 25, 1985 public meeting.

In suggesting school configuration does not necessarily impact upon achievements and attitudes of children, Libonate said certain factors do affect achievement. They include how tightly curriculum is articulated (coordinated) grade to grade and teacher to teacher, relative strength of leadership of principal and staff concerning instruction, soundness of school discipline, expectation levels of teachers, students and community for achievement, and continuous monitoring of pupil progress.

Dr. Samuel B. Stewart, school superintendent in Ridgewood for the past ten years and before then employed as assistant superintendent for curriculum for six years, testified he had a substantial role as chief executive officer in the district to make recommendations to the Board for reorganization of schools. His first chief recommendations were made orally and in writing to the Board at its public meeting on January 21, 1985. P-1. The recommendation at that time, he said, was for the first component of reorganization, that of a four year high school. The entire process of recommendation, he said, has dominated his professional life in the district. He has spoken to many people in the community and leaders of citizen groups. He has attempted,

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he said, to secure community input by close contact with elements of the community and has had substantial advice both from the community and from administration. Genesis of the K-2, K-5 concept was at the end of February 1985, he said, and was formally presented by him to the Board at the public meeting of February 25, 1985. As to that particular component, he said, there was considerable community publicity and input at meetings held in district schools, where the proposal was aired. In his view the K-2, K-5 concept is educationally sound since the school change necessitated in such configuration comes at the beginning of the third grade and represents a logical breaking point for transfer to third grade. During the K-2 years, younger children have started to learn to read and have nevertheless remained near their homes. In Ridgewood there are presently seven elementary schools and a total of ten schools.

In his report to the Board on February 25, 1985, the superintendent's plan outline was this:

> Dr. Stewart reviewed the criteria used to analyze the elementary schools. He recommended a K-5 organization for Orchard, Ridge, Somerville, Travell, and Willard schools with Glen and Hawes schools becoming K-2 attached to Travell and Somerville schools respectively. Under this plan, he said, the third, fourth and fifth graders from Hawes and Glen districts would attend Travell and Somerville schools, with busing provided where needed. In addition, some students would be shifted from Somerville to Travell and from Travell to Ridge and Willard schools. He said all buildings would be kept opened and maintained, and unused space at Glen and Hawes would be rented. Their rentals would offset the cost of heating, lighting and maintaining the buildings. [P-4 at 131].

In all the proceedings that culminated in Board action of approval on March 25, 1985, Stewart said, he felt there had been ample public opportunity to object to the plan and to air opposing views.

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IV

Thomas Burgin, Board secretary, was called as a witness on order of the administrative law judge pursuant to N.J.A.C. 1:1-3.9. One of his functions as Board secretary (he is also business manager) is to attend all Board meetings, public and private, and to keep minutes. [N.J.S.A. 18A:17-7].

Burgin said he takes minutes of some of the meetings and an assistant secretary to the Board takes the rest. Minutes of Board meetings are separated into categories and kept in bound volumes in his office: minutes of special meetings and open work sessions; a third volume contains minutes of all executive sessions.[1] Minutes are bound into volumes annually at the end of the school year. They are kept in loose volumes until June 30 of the school year and then sent for permanent binding. The volumes of running typewritten Board minutes are kept in the Board secretary's office before the binding process. The witness produced at hearing three volumes, the first containing minutes of regular meetings for the year 1984-85, the second for open work session minutes for the same period, with pages numbered sequentially according to date, and the third binder for minutes of executive or closed sessions. The process of minute-taking, he said, is for either him or the assistant secretary to prepare minutes in rough draft form for distribution to the superintendent's cabinet for corrections or additions. (The superintendent's "cabinet," he said, refers to administrative officers in the district.) After suggestions by cabinet members are taken into account, the minutes are given to the Board for review. They then appear on the next agenda of the Board for approval. Often, he said, Board members introduce revisions before final adoption, on motion and vote. Approval of minutes of prior Board public meetings are usually the first item on subsequent agendas. There are time lags between dates of particular meetings and later approval of such minutes by the Board. Only after public adoption of approval by the Board are minutes of any meetings made available to the public. That, in any event, he said, was the procedure for minutes of public sessions of the Board.

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1 The Board's official schedule of regular meetings for the 1984-85 school year defined executive sessions as those calculated to "handle matters which by law may be discussed in closed session. Such matters include negotiations, personnel, security, real estate, litigation and investments." See R-16 at 127.

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For executive or closed session minutes, he said, he would frequently make notes and the assistant secretary would type the minutes from his notes. A rough draft would be submitted to the superintendent's cabinet as in the case of minutes of public sessions. After circulation to the cabinet, such minutes are typed in final form and delivered to the Board. But Burgin said there was no official approval process by the Board for minutes of executive or closed sessions. No official approval process by the Board is undertaken, he said, because the Board has undertaken no official action; thus, there is no need to approve the recording. Transcript, October 31, 1985, at 18. Board members may have corrections, and, if so, they make corrections as needed. The minutes then go into Burgin's official binder of executive or closed session minutes. Burgin himself puts them there. He regards the minutes of executive or closed sessions as returned to him after submission to the Board and after having been inserted in the executive session book as official minutes. Id., at T19. Again, he said, there could be a time lag in the process of some weeks.

Although Burgin testified there was no restriction on or limitation of access to executive or closed session meeting minutes once the need for confidentiality had ceased, a determination that the need for confidentiality had ceased was in practice left to him or, as he said, by consultation with the superintendent if he had any doubt about public disclosure. Id., at T22-23. Asked to look at executive or closed session meeting minutes of January 7, 1985 (P-5), January 22, 1985 (P-6), January 28, 1985 (P-7), February 19, 1985 (P-10), February 12, 1985 (P-11), February 14,1985 (P-13), February 14, 1985 (P-12), and February 25, 1985 (P-14), Burgin said he saw no element requiring unusual confidentiality and he would have had no compunction about immediately permitting public access to the minutes. Id., at T22-28. Concerning an executive or closed session of the Board on February 4, 1985 (P-9), Burgin said matters of "reorganization" did not in his view require confidentiality, nor did the subject of the 1986 school calendar, another item discussed in closed session by the Board. Id., at T29. Indeed, he said, even the subject of a certain

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citizen's complaint referred to in the minutes did not require confidentiality since, he noted, the entire matter at the time had been brought to a conclusion. Id., at T30. He would have considered answering a request from the public for disclosure of closed session minutes by disclosing parts of the minutes even if other parts in his judgment required maintaining confidentiality. Id., at T31.

Burgin noted he was responsible for issuing notices of special meetings for advertisement in local newspapers. His instructions to do so, he said, came either from a Board member or from the superintendent or on occasion from his own knowledge gained at meetings of the cabinet or at regular public meetings. Id., at T32-34.

Finally, in response to a question whether there was any way in which he or the Board or any administrator informed the public as to when executive or closed session meeting minutes could at any later time be made available for public scrutiny, Burgin said he was not aware of any mechanism that "we so announce to the public." Id., at T35. Asked by the administrative law judge how a citizen might know that confidentiality or a confidential minute subject no longer had to be kept confidential and that the citizen or others had a right to access thereto, Burgin said that based on his past experience, a person interested in a copy of the minutes would come to him and ask for one and, "at that point, they would find out whether they were available or not." He conceded he had never been asked for minutes of executive or closed sessions of the Board, "so I can't recall what I would do." Id., at T35.

V

As indicated above, reorganization of the schools in the district was approved by the Board in three components, following administrative recommendation, at two public meetings: component (a) of the reorganization, grades 9-12, was approved at January 21, 1985 meeting; components (b), grades 6-8 and (c), K-5 with two elementary schools as K-2, were approved on March 25,1985. P-1 and P-17. Just before and during that two month span, however, the Board contrived to retire into executive or closed session and, outside hearing of the public, discuss and deliberate upon the broad question of "reorganization"

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on some ten occasions from late October 1984 until the end of February 1985. P-26; and P-5, 6, 7, 9, 10, 11, 12, 13 and 14. For each of those occasions a notice from the Board's secretary was sent to newspapers in advance for publication of notice that a special public meeting was to be held for the purpose of voting to go into executive or closed session to discuss "matters relating to personnel." R-32, 33, 34, 35, 36, 37, 38, and 39. And indeed, the Board met in accordance with prior special notices in public session immediately to vote to retire into executive or closed session to discuss "matters pertaining to personnel." R-21, 22, 23, 24, 25, 26, 27, 28, and 29.

The first of those executive or closed sessions was conducted not in the district but in Southampton, Long Island, on October 26, and 27, 1984, at the vacation home of a Board member. Advertisement of notice of a special public meeting was given at which the Board was to vote to retire into executive or close session. R-31. A perfunctory public meeting was held on October 26, 1984 at the appointed time and place and the Board resolved to retire into executive or closed session for the purpose of discussing "possible reorganization of schools in light of declining enrollment and negotiations." R-20; and see P-26 and R-21. Recorded minutes of the meeting (P-26) showed the director of personnel reviewed current and projected enrollment through 1989, capacity of all buildings, outline of capacity figures based upon various scenarios of closing selected elementary schools, and high school enrollment projections with other districts. The superintendent reviewed recommendations of the enrollment committee and discussed program advantages of a K-5, 6-8, 9-12 configuration. General discussion ensued. The meeting was attended by all Board members and some seven administrators.

One of those in attendance at the meeting was assistant superintendent Cobb. At hearing, the following examination ensued (transcript, October 28, 1985, T179 to 184):

> Q. And was the public invited to attend this meeting at Southampton?

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MR. ROSEN: Objection. It was a notice that was issued and the notice speaks for itself.

THE COURT: Can you reframe the question and tell us what — tell the witness what you mean by invited?

Q. Now, the regularly open work session meetings are held at the education center, are they not?

A. Yes, sir.

Q. And so that the public and the citizenry of Ridgewood have a right to attend even though they don't have anything to say; is that correct?

A. That's right.

Q. Now, would you tell the Court, if you can, how the public could attend a meeting at Southampton, New York if they wanted to just observe and not take part?

MR. ROSEN: Objection, argumentative —

THE COURT: Do you understand it?

THE WITNESS: Yes.

A. As a practical position, I don't think the meeting — the public could attend. I think that meeting is planned as a Board retreat. It deals with very informal discussion on a broad range of topics. In no way is there any attempt to come to any kind of conclusions or decisions and I guess in my own mind, I wonder whether it constitutes a meeting but the intent is one to have the Board be able to informally discuss things in a very informal manner, things at the very beginning of the year.

Q. Well, according to— strike that. You said this was a sort of retreat?

A. Yes.

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Q. What do you mean by that?

A. I mean out, away from the local community, the pressures of dealing with a formal agenda, the pressures of time and trying to deal with too many topics and to answer questions that come up in a regular public meeting. This is in a sense a retreat from that and an opportunity for the Board to just get a feel for all of the issues that are facing the district. It's mostly a situation where the superintendent and other members of the central office administratrion brief the Board on things that are going on in the district and problems and issues and opportunities that face us.

Q. And you say they do that to get away from the public, sir?

A. I said they do that in a sense, you asked me about the retreat and the retreat is in a sense to get away from all the pressures, I said— well, I've answered it. The agenda and everything else.

Q. Sir, if this is what, a "retreat," why were minutes kept of that meeting?

A. I don't know.

Q. At a regular committee of the whole workshop, would the public have a right to be present but not be heard?

A. Yes.

Q. But here was the same kind of a situation?

A. We don't have a committee of the whole workshop.

Q. Yes—

A. No.

MR. ROSEN: The terminology is confusing the witness. There is no such meeting designated as such.

MR. EVERS: Excuse me.

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Q. Dr. Cobb, does this recite minutes of the whole committee workshop held on October the 26th?

A. Yes.

q. This was called a committee workshop, committee meeting, wasn't it?

A. Yes.

THE COURT: What are you referring to?

Mr. EVERS: Exhibit P-26, sir.

THE COURT: All right. Have you seen it?

THE WITNESS: Yes, sir, I just did.

Q. Dr. Cobb, at this meeting in Southampton, New York on October the 26th and 27th, 1984, there was a discussion on the same matters that would be discussed at any open work session; isn't that correct?

MR. ROSEN: Objection. Calls for a characterization of the witness' testimony.

THE COURT: What was that, Mr. Evers, you want the witness to declare the obvious?

MR. EVERS: All right. I'll leave that alone.

THE WITNESS: Sir.

THE COURT: October the 27th, 1984, was this just about a year ago?

THE WITNESS: Yes.

THE COURT: If today is the 27th of October, 1985, do you recall that meeting in Southampton?

THE WITNESS: Yes, I do.

THE COURT: Was the weather good out there?

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THE WITNESS: No. It was terrible.

THE COURT: The sun didn't shine?

THE WITNESS: The sun didn't shine the whole time.

At none of the ten-odd occasions when the Board resolved to retire into executive or closed session to discuss "matters pertaining to personnel" was a resolution adopted at a public meeting stating as precisely as possible the time when and the circumstances under which the discussion conducted in closed session could be disclosed to the public. [N.J.S.A. 10:4-13]. See R-20, 21, 22, 23, 24, 25, 26, 27, 28 and 29. And at no time after executive or closed session did the Board in its minutes promptly make available to the public the matters discussed confidentially in such meetings. [N.J.S.A. 10:4-14]. At no time before giving notice of executive or closed session of the Board where members of the public would be excluded in order to permit the Board to discuss "matters pertaining to personnel" did the Board give, nor apparently find it necessary to give, notice to any specific prospective or current public officer or employee that his/her rights would be the subject of "personnel" deliberation. [N.J.S.A. 10:4-12(b)(8)].[2] The only persons present at all executive or closed sessions of the ten-odd such sessions were Board members, superintendent, assistant superintendent-secondary Board secretary/business administrator, director of personnel, executive assistant, director of management information services and assistant superintendent-elementary. P-26, 5, 6, 7, 9, 10, 11, 12, 13 and 14. On all occasions, the subject of school reorganization was prominently discussed. On the majority of occasions, the subject of school reorganization was the only matter discussed.

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2 On one other occasion, at an annually noticed open work session held on March 4, 1985, the Board concluded its business by adjourning from public session to retire into executive session to discuss "matters pertaining to personnel," without any minute-keeping of proceedings at the closed meeting and without any prior notification to any ostensibly affected specific current or prospective public officer or employee. [N.J.S.A. 10:4-14; 4-12(b)(8)]. See P-15 at 159.

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DISCUSSION

Petitioners argued, generally, that the Board violated provisions of the Open Public Meetings Act by deceptively retiring into executive or closed sessions, ostensibly to discuss "matters of personnel," and then instead discussing reorganization; that the Board failed to grant the public at large opportunity to have sufficient input into the reorganization plan as adopted and that, for that reason alone, it should be set aside; that the Board's actions in all were arbitrary, capricious and in bad faith and should thus be set aside; that the Board's adoption of the final reorganization plan at an "open work session" was contrary to law and should be set aside; and that the final reorganization plan as adopted was itself not based on sound educational considerations and should be set aside.

The Board argued that components of the school reorganization plan adopted on January 21, 1985 and on March 25, 1985 were entirely reasonable and had entailed a critical examination of recommendations from study groups, prior administration and the public at large after adequate public discussion and an opportunity for substantial community input into the broad question of proposed reorganization. It urged the reorganization as proposed and adopted was educationally sound and did not discriminate against pupils in the district. It urged complaint against Board action at public meetings on January 21 and February 25, 1985 was beyond petitioners' attack because out of time; that Board meetings cited in the petition were in conformity with the public notice requirements of the Open Public Meetings Act; that allegations that the public was denied opportunity for adequate community input were without basis under the Act; that even assuming violations of the Act, subsequent public action taken at public meetings cured any such violations; and that allegations that the Board conducted executive or closed sessions in which aspects of reorganization were discussed were time-barred and otherwise lacked merit.

Petitioners' contentions that the reorganization plan in its three components as adopted was educationally unsound have not been borne out by the evidence. Neither petitioner here evidenced any expertise in his/her philosophy of educational soundness sufficiently to do more than voice disagreement, at best, with witnesses for the Board,

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the superintendent, an assistant superintendent for secondary education and an assistant superintendent for elementary school in the district, whose testimony supported the reorganization features; and neither petitioner was able sufficiently to establish that any students within the reorganized districts, particularly K-2, K-5, suffered discrimination. In a like vein, neither petitioner was able to substantiate that such features of the plan as called for pairing of schools under one principal were unlawful as contrary to N.J.A.C. 6:8-4.3 for want of prior county superintendent approval thereof. I am satisfied that such prior approval was sufficiently established. R-3, R-4.

It may be suggested, as urged by the Board, that the requirement under the Public School Education Act of 1975 (N.J.S.A. 18A:7A-1 et seq.) that a thorough and efficient system of free public schools shall include encouragement of public involvement in the establishment of educational goals (N.J.S.A. 18A:7A-5(b) and N.J.S.A. 18A:7A-2(a)(5)) ought to be differentiated carefully from the requirement of the Open Public Meetings Act that the public has the right to be present at all meetings to witness in full detail all phases of the deliberation, policy formulation and decision-making of public parties (N.J.S.A. 10:4-7). Under N.J.S.A. 10:4-12(a) nothing in the Open Public Meetings Act shall be construed to limit the discretion of a public body to permit, prohibit or regulate participation of the public at any meeting. Under the latter Act the public may have the right to attend and witness but not necessarily to participate by public discussion in the business of the Board. That local boards of education are public bodies subject to the Open Public Meetings Act, it may be suggested, is given. Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979). The Commissioner of Education has jurisdiction to determine controversies thereunder. Id., at 187. See also Attorney General's Formal Opinion #19, June 22, 1976, at 190-92. Training and workshop sessions of local boards of education, it was ruled, are subject to provisions of the Act. Id., at 195.

Were it not for questions in this matter that have arisen concerning the Open Public Meetings Act, as evidenced developed, the question whether Board approval of reorganization was arbitrary and unreasonable for want of opportunity of adequate public

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input before approval would, in my view, survive petitioners' attack. In Zimmerman v. Denville Bd. of Ed., 1982 S.L.D — (March 23, 1982), aff'd. St. Bd., 1982 S.L.D — (July 7, 1982), in which a local school closing was challenged under N.J.S.A. 18A:7A-2(5) and (6), for the board's allegedly having excluded parents and interested non-parent taxpayers, other than board members, from a special committee to study the closing, petitioner claimed the board should have formed a citizens advisory committee to conduct a long range study of school needs, should have conducted a town meeting for dialogue on the issue, should have created a declining enrollment committee, should have solicited participation from communiuty organizations, and should have distributed information to the public through newsletters. An administrative law judge found the board had made a good faith effort to keep the public informed on the school closing issue , however, and had provided reasonable opportunity for the public to be heard on the issue. The Commissioner noted the board had not formed a citizens advisory committee but declared the omission, under proofs before him, did not rise to the level of requiring him to reverse the board for arbitrary action. In all, the Commissioner found, and the State Board concurred, there was no evidence of bad faith, impropriety or unreasonable action. Board action in approving the school closing as put to the public was affirmed and the petition dismissed.

From evidence here, the history of Ridgewood school reorganization began, at least for present purposes, as long ago as 1978 with a report by the then Commission on Fiscal Management that detailed its investigation into problems of declining enrollment, continuing inflation, budget caps, and an economic forecast into the 1980's. R-8. In 1983, the Board appointed 53 school and community members to an Enrollment Committee and charged it to define problems confronting the district and to inform the community of the enrollment situation, with future projections, and, finally to recommend proposed courses of action for the Board. P-3. In June 1984, the Enrollment Committee clarified its recommendations and urged a particular reorganization plan in three components, most prominently featuring a four-year high school with two middle schools. The revised recommendations of the Enrollment Committee were a subject of discussion at a regular

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public meeting of the Board on July 6, 1984. R-46. Throughout all, the evidence showed, newspaper publicity about the Committee report was extensive and detailed. R-53, 54, and 55. Such a record of community involvement, participation and Board publicity, if it stood alone, would serve to dispel suggestion that Board action ultimately in January 1985 and March 1985 was deficient for want of public involvement under provisions of N.J.S.A. 18A:7A-5(b). Cf. Fairmont School Parent Teacher Association v. Bd. of Ed., Township of West Orange, 1985 S.L.D. -- (December 9, 1985) (slip opinion at 31-2).

But as evidence developed, the sufficiency of community input under the Public School Education Act of 1975 became clouded by the Board's conduct of its deliberations on reorganization in private just before, and during, adoption of the reorganization plan at the two public meetings of January 21, 1985 and March 25, 1985. It is more than obvious from the evidence that the Board's private deliberations during that time were improper under the Open Public Meetings Act: specifically, at some ten executive or closed sessions of the Board during January and February 1985 and, surprisingly, at Southampton, New York on October 26 and 27, 1984. The malaise apparent during those critical times stemmed, I believe, from serious misconception about the Board's duties and obligations to the public under the Act. No board, as a public body, has the right to "retreat" from public view to conduct its deliberations. Unlike the president of the republic or the governor of the State, no board has the right to retire to confer privately with its "cabinet." Boards must stay and take the kitchen heat and members disinclined to do so have chosen the wrong vehicle for public service. The misconception becomes critical even if the Board in its conduct cannot be said to have been impelled by wrongful intent. Lack of wrongful intent does not excuse noncompliance with the Act. In Polillo v. Deane, 74 N.J. 562, 577 (1977), the Supreme Court said:

> The thrust of defendants' argument is that the Court should uphold the [the public body's] recommendation on the basis of its substantial compliance with the Sunshine Law. They assert (1) that there was no attempt "to meet secretly or without some notice to the public," . . . (2) any meeting at which formal votes were taken complied with the Act, thereby satisfying the requirements of the law. Although, on these facts, we impute

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> to the [public body] no wrongful motivation for choosing to conduct its business as it did, lack of wrongful intent cannot excuse noncompliance with the Act. Such a reading of the statute would invite abuse and would contravene the legislative intent enacting the provision.

Enacting the Open Public Meeting Act, the Legislature found and declared that the right of the public to be present at all meetings of public bodies and to witness in full detail all phases of the deliberation, policy formulation, and decision making of public bodies, is vital to the enhancing and proper functioning of the democratic process; that secrecy in public affairs undermines the faith of the public in government and the public's effectiveness in fulfilling its role in a democratic society. The Legislature declared it to be the public policy of the State to ensure the right of its citizens to have adequate advance notice of and the right to attend all meetings of public bodies at which any business affecting the public is discussed or acted upon in any way, except only in those circumstances where otherwise the public interest would be clearly endangered or the personal privacy or guaranteed rights of individuals would be clearly in danger of unwarranted invasion. Any public body, like a board of education, that is organized by law and is collectively empowered as a multi-member voting body to spend public funds or affect persons' rights is covered by the Act. N.J.S.A. 10:4-7, 8. A public body may exclude the public only from that portion of the meeting at which it discusses certain excepted matters including, as an exception, any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting. N.J.S.A. 10:4-12(b)(8). No public body shall exclude the public from any meeting to discuss any matter so excepted until it shall first have adopted a resolution at a meeting to which the public shall be admitted stating the general nature of the subject to be discussed and stating, as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the

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public. N.J.S.A. 10:4-13(a),(b). Every public body shall keep reasonable comprehensive minutes of all its meetings showing the time and place, the members present, the subjects considered, the actions taken, the vote of each member, and any other information required to be shown in the minutes by law, which shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with allowable exceptions. N.J.S.A. 10:4-14. Any action taken by a public body at a meeting which does not conform with provisions of the Act shall be voidable, in proceedings brought by any person within 45 days after the action sought to be voided has been made public. N.J.S.A. 10:4-15. [Emphasis added].

Of what consequence is the cloud of the Board's conduct of its deliberations in private? In Polillo v. Deane, supra, Atlantic City voters approved formation of a charter study commission to study the problem of selecting a form of government for the city. Five persons were selected to serve on the charter commission. In order to fulfill its statutory purpose, the commission held 27 regular meetings between May 13 and September 3, 1976. Another meeting was held at a commissioner's home in the third week of July and an emergency situation caused another meeting to be held in September 1976, just prior to the regularly scheduled meetings. The commission filed its final report with the city clerk on September 3, 1976, as required by statute. The commission's activities, however, were marked by dissension. One of the commissioners led vigorous debate over alleged violations of the Sunshine Law. In a suit started against the city and the commission, he argued the public notice accompanying each of the commission's meetings failed to comport with provisions of N.J.S.A. 10:4-8(d) requiring advance notice thereof of at least 48 hours. No formal notice was given of at least three of the meetings. Many of the notices published failed to disclose the agenda. Three of the meetings for which no notice was given were designated as "emergency situations." The trial judge concluded the commission was a public body covered by N.J.S.A. 10:4-6 and held every meeting conducted by the commission failed to meet requirements of the Act. He rejected the commission's contention that substantial rather than strict compliance was sufficient. On appeal, the Appellate Division reversed the trial judge. On certification by the Supreme Court, judgment of the Appellate Division was reversed. The Court noted, as found by the

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trial judge and as affirmed by the Appellate Division in passing, that each and every meeting conducted by the commission violated the Act even though final action of the commission was done at a single public meeting, and even though no formal action was taken at any of the other meetings conducted contrary to the Act. It rejected specifically substantial compliance as opposed to literal fulfillment and performance of obligations under the Act. More importantly, the Court rejected the commission argument that only notices given before the last two critical meetings need be looked at by the Court. To do so, said the Court, would undermine the entire purpose of the Act:

> This would allow an agency to close its doors when conducting negotiations or hammering out policies, and then to put on an appearance of open government by allowing the public to witness the proceedings at which its action is formally adopted. Such an interpretation of the statute would conflict with N.J.S.A. 10:4-15(a) which provides that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this Act. Surely it cannot be realistically contended that the final two meetings constituted a de novo reaffirmation of the activities which had transpired at the previous meeting. Consequently, even assuming the commission did comply with the Act at these last two meetings, we do not believe that its actions were sufficient to correct the past violations which the trial judge found.

The Court went on to determine, since it found the commission had violated the Act, what remedy and relief was appropriate under the circumstances. It noted remedial provisions under N.J.S.A. 10:4-15 contemplated flexibility in rectifying governmental action that fell short of standards of openness otherwise prescribed for conduct of official business. Only in that context did the substantial compliance argument carry weight. Nevertheless, said the Court, invalidation of the final governmental action taken by the commission, namely, its actual recommendation as to the form of government to be placed on the ballot and the antecedent meetings at which the commissioners deliberated and reached their conclusion, was required. In fashioning a remedial solution, however, it was not necessary, said the Court, to invalidate and repudiate all other public meetings, particularly those at which testimony and evidence were received. It directed the

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commission to embark again upon its task of considering an appropriate form of government to be recommended for approval by the voters. In so doing, the commission was allowed in its discretion to utilize such testimony and evidence as it acquired in its original effort as was deemed necessary and appropriate. However, any decision in that regard was required to be arrived at in a manner in strict conformity with the Open Public Meetings Act so that the public might be fully apprised by adequate notice and a publicized agenda exactly what prior meetings and what aspects of the existing commission record was sought to be so utilized. Id., at 577-80.

That the Ridgewood Board violated its obligation to conduct all deliberations in public when it determined to retire into executive or closed sessions ostensibly "to discuss matters pertaining to personnel" is patent. What it did was sham. No specific personnel, current or prospective, were in fact discussed, as otherwise required under the personnel exception in N.J.S.A. 10:4-12(b)(8). Before retiring to executive or closed session, the Board at no time adopted a sufficient prior resolution that was not deceptive about the subject to be discussed or that was accompanied by a statement when discussions could be disclosed to the public, as required by N.J.S.A. 10:4-13. Although minutes were kept of the executive or closed sessions, those minutes were not promptly made available to the public when confidentiality was no longer necessary, as required by N.J.S.A. 10:4-14. The very existence of such executive or closed session minutes, according to evidence here, remained solely within knowledge of the Board or its board secretary. Public access thereto was thus effectively denied. Although the Board argued here that petitioner's attack upon the reorganization plans adopted in public was untimely for being beyond the 45 day limiting period of N.J.S.A. 10:4-15, that is to say no action to declare void the plan was instituted until after expiration of 45 days from January 25, 1985, applicability of that limiting period cannot be here allowed because of the secrecy shrouding existence of the closed session minutes. That is to say, petitioners here, nor indeed the public at large, could not be said to have been aware of the deception in those meetings until after institution of the suit. N.J.S.A. 10:4-15 specifically provides that voidability actions may be instituted within 45 days after the action sought to be voided has been made public.

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Finally, the circumstance that the two public meetings, January 21, 1985 and March 25, 1985, were in public session, and the fact that no formal action was taken at any executive or closed session, are irrelevant under Polillo. The infectious taint of secrecy, an offense to the spirit if not also the letter of N.J.S.A. 18A:7A-2(5) and N.J.S.A. 18A:7A-5(b), requires invalidation of all public meeting action by the Board on those two occasions. Cf. Polillo at 578; Precision Industr. Design Co. v. Beckwith, 185 N.J. Super. 9, 14 (App. Div. 1982); and Gannett v. Bd. Ed. Manville, 201 N.J. Super. 65,69-70 (Law Div. 1984).

CONCLUSION

Accordingly, based on the foregoing, wherein I shall find all facts as generally recited, I **FIND** and **DETERMINE** that adoption of resolutions of the Board in approving a reorganization plan for the district in three aspects on two public meeting sessions on January 21, 1985 and March 25, 1985 is voidable for violations of the Open Public Meetings Act just before and during its deliberative process: that is, on October 26 and 27, 1984 and on some nine other occasions during January and February 1985. Executive or closed session meetings conducted then were violative of the Open Public Meetings Act for illegal exclusion of the public contrary to N.J.S.A. 10:4-12(b)(8) and for failure of adequate prior notice at a public meeting or in the newspaper indicating the time when and circumstances under which closed session discussions of the Board could be disclosed to the public, contrary to N.J.S.A. 10:4-13; and violative of the requirement that minutes kept at such executive or closed sessions of the Board should have been, but were not, promptly made available to the public, contrary to N.J.S.A. 10:4-14. I **FIND** and **DETERMINE** that the limiting period of 45 days within which to seek remedial action was tolled and did not begin to run until public availability of or public access to executive or closed session minutes was provided and that such provision did not occur at any time before institution of suit herein, within the meaning of N.J.S.A. 10:4-15(a). I **FIND** and **DETERMINE** that conduct of such executive or closed session meetings violative of the Act in those respects was abusive thereof and infectiously tainted adoption and approval of the reorganization plan at public sessions of the Board on January 21, 1985 and March

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25, 1985, with result that such action at those times should be, and are hereby, **INVALIDATED.** In accordance with Polillo, the Board is **DIRECTED,** should it hereafter determine to reembark upon its task of considering an appropriate form of reorganization of the school district, to do so only upon resubmission of the questions at properly noticed public meetings without violation of the Open Public Meetings Act as hereinabove found. In so doing, I **ORDER** the Board may in its sound discretion utilize so much of the testimony and evidence acquired over the course of general district consideration of the question of reorganization in original investigatory efforts as hereafter it deems necessary and appropriate. Finally, the Board is **ORDERED** (1) to discontinue its practice of failing to approve executive or closed session minutes as promptly as the need for confidentiality has ended and of permitting the board secretary or superintendent to be arbiter of continuance of confidentiality thereof; and (2) to comply precisely hereafter with N.J.S.A. 10:4-12, 13, 14 pertaining to the keeping and prompt release of executive or closed session minutes. The remainder of petitioners' claims are **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 26, 1986
DATE

JAMES A. OSPENSON, ALJ

FEB 28 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 3 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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RICHARD A. VOLL AND SALLY BRANDES,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD AND SAMUEL STEWART, BERGEN COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions to the initial decision, as well as reply exceptions, were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioners except to that portion of the initial decision's conclusion which dismisses the remainder of petitioners' claims. Specifically, petitioners wish the Commissioner to consider paragraph 10 of their Petition of Appeal alleging that the meeting of March 25, 1985 was neither a regular meeting nor was it a special meeting of the Board and, by reason of that fact, the Board was not empowered to take any formal action. (Petitioners' Exceptions, at p. 1) Petitioners aver that the Commissioner should not sanction the taking of formal action by boards of education at meetings where the public is given no opportunity to have any input or to be heard, particularly in cases as vitally important as reorganization of school districts.

Petitioners suggest that the March 25, 1985 meeting, an "Open Work Session," was neither a regular meeting nor a special meeting, the only two types of meetings at which a Board may act publicly, and that its March 25 actions are thus voidable. Petitioners cite Perry v. Board of Education of the River Dell Regional High School District, decided by the Commissioner October 25, 1979, State Board aff'd April 8, 1980 for this proposition. Petitioners also except to that part of the conclusion of the initial decision which dismisses their allegations set forth in paragraph 14 of their Petition of Appeal, alleging a violation by respondents of N.J.S.A. 18A:7A-2, et seq. and of the statutes and decisions applicable in such matters. Petitioners contend that respondents in this matter did not permit sufficient involvement by the public in their deliberations regarding reorganization.

Respondents cite five exceptions to the initial decision:

1. THE ALJ ERRED IN RULING THAT THE BOARD'S PUBLIC MEETINGS DID NOT CURE ANY ALLEGED VIOLATIONS OF THE OPEN PUBLIC MEETINGS ACT THROUGH DE NOVO ACTION.

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2. THE ALJ ERRED IN RELYING ON POLILLO V. DEANE, 74 N.J. 562 (1977), AS MANDATING INVALIDATION OF THE BOARD'S ACTIONS UNDER THE FACTS OF THIS CASE.

3. THE ALJ ERRED IN FAILING TO FIND THAT BROAD COMMUNITY INPUT WAS EVIDENCE OF GOOD FAITH OF THE BOARD, AND THEREFORE, RELEVANT AND PERSUASIVE AS TO A DETERMINATION OF REMEDY OTHER THAN THE OVERLY HARSH INVALIDATION OF THE BOARD'S ACTIONS RECOMMENDED.

4. THE ALJ ERRED IN RULING THAT THE 45-DAY STATUTE OF LIMITATIONS WAS TOLLED BY ALLEGED FAILURE OF THE BOARD TO MAKE KNOWN THE EXISTENCE OF ITS EXECUTIVE SESSION MINUTES.

5. THE ALJ ERRED IN RULING THAT THE BOARD MUST APPROVE ITS EXECUTIVE SESSION MINUTES AND IN RULING THAT NEITHER THE BOARD SECRETARY NOR THE SUPERINTENDENT CAN DETERMINE WHEN THE NEED FOR CONFIDENTIALITY NO LONGER EXISTS AND WHEN EXECUTIVE SESSION MINUTES MAY BE RELEASED. (at pp. 1-3)

Respondents' arguments on Exceptions 1-3 essentially repeat those set forth in its post-hearing brief and addenda and are therefore incorporated herein by reference. In support of Exception 4, respondents argue that the ALJ points to no statutory or case law which has previously tolled the 45-day statute of limitations provided by N.J.S.A. 10:4-15. Respondents aver that the public was on notice that the Board met privately on reorganization in Southampton and that "***minutes of subsequent Board meetings relate public knowledge or suspicion of additional such meetings.***" (Respondents' Exceptions, at p. 24) Respondents suggest that the ALJ's "***novel reading of the law, while creative, is totally lacking in practicality. Such a rule would allow attacks on actions of public bodies months, and indeed, years after action had been supposed to have been valid, merely because the notice of an executive session might be deemed to be less than explicit." (Respondents' Exceptions, at p. 25) Respondents argue that the instant petition was not filed until April 22, 1985; however, the last "whole executive session" in issue was held on February 25, 1985. Petitioners were required, respondents avow, to bring their action by April 11, 1985, which they did not do. Thus, respondents contend, the petition is out of time, pursuant to N.J.S.A. 10:4-15.

In Exception 5, respondents contend that the ALJ pointed to no case law or statutory provision which requires a public body to "***'approve' its executive session minutes.***" (Respondents' Exceptions, at p. 26) While Respondent Board maintains it has fully complied with N.J.S.A. 10:4-13(a), any violation was cured by subsequent public action. Finally, respondents suggest that neither statute nor case law precludes the board secretary or the superintendent from determining when the need for confidentiality no

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longer exists and the minutes of a particular executive session or part thereof may be released. Respondents suggest that to require Board action and approval would be burdensome and that this cannot be the intendment of the Act.

Petitioners' Reply Exceptions are summarized below:

1. THE SO-CALLED STATEMENT OF THE FACTS IN THE BOARD'S EXCEPTIONS TO THE INITIAL DECISION SHOULD BE IGNORED AS IT IS NOT PROVIDED FOR IN N.J.A.C. 1:1-16.4.

2. RESPONDENTS' EXCEPTION ONE IS WITHOUT MERIT.

   To respondents' allegation that the ALJ failed to adequately address the fact that there were at least four public meetings at which the Board discussed and/or acted on reorganization from January to March 1985, petitioners respond stating that the ALJ gave full and complete attention to all public meetings of the Board referred to by respondents. Petitioners add that the issue herein involves not whether specifically designated meetings violated the Act but whether the Act was violated in any respects.

3. THE ALJ DID NOT ERR IN RELYING ON POLILLO V. DEANE AS MANDATING THE INVALIDATION OF THE BOARD'S ACTIONS UNDER THE FACTS OF THIS CASE AS ALLEGED IN RESPONDENTS' EXCEPTION TWO.

4. THE BOARD DID NOT ACT IN GOOD FAITH AND THE ACTION OF THE ALJ IN ORDERING THE BOARD TO COMPLY WITH THE PROVISIONS OF THE OPMA WAS PROPER IN ALL RESPECTS.

   To Respondents' allegation that charges that the ALJ mistakenly allowed his perception of Sunshine Law violations to cloud his judgment as to the role of public input in evidencing the "lack of wrongful intent" (Exceptions, at p. 22), petitioners respond that what was clouded was not the ALJ's judgment in this matter. Rather "what was shrouded in secrecy was (sic) the actions of the Respondent Board in telling the public on numerous occasions it was going to go into executive sessions to discuss matters relating to personnel and then discussing such matters as reorganization.***" (Petitioners' Reply Exceptions, at p. 5)

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5. THE ALJ DID NOT ERR IN RULING THAT THE 45-DAY STATUTE OF LIMITATIONS WAS TOLLED BY THE FAILURE OF THE BOARD TO MAKE KNOWN THE EXISTENCE OF ITS EXECUTIVE SESSION MINUTES.

   In response to respondents' allegation that the ALJ points to no statutory or case law which has previously tolled the 45-day statute of limitations provided by N.J.S.A. 10:4-15, petitioners respond that it was not until after the Petition of Appeal had been filed and after discovery was undertaken that it was discovered that the Board allegedly had been discussing in executive sessions matters it had no legal right to discuss. Further, petitioners aver that the Board is estopped from seeking to set up the defense of the Statute of Limitations citing Lawrence v. Bauer Pub. and Printing Ltd., 154 N.J. Super. 271 (App. Div. 1977), rev'd 78 N.J. 371 (1979)

6. THE BOARD SHOULD BE REQUIRED TO APPROVE ITS EXECUTIVE SESSION MINUTES.

   Petitioners query why the board secretary or the superintendent should be the ones to determine when the need for confidentiality no longer exists.

Respondents' Reply Exceptions are summarized below:

1. RESPONDENTS, IN ADOPTING A SCHOOL REORGANIZATION PLAN ON JANUARY 21, 1985 FOR 1986-87 AND A FURTHER REORGANIZATIONAL PLAN AT AN OPEN WORK MEETING OF THE BOARD ON MARCH 25, 1985, ACTED IN A NONARBITRARY, NONCAPRICIOUS AND REASONABLE MANNER IN CRITICALLY EXAMINING RECOMMENDATIONS FROM STUDY GROUPS, ADMINISTRATORS AND THE PUBLIC AT LARGE AFTER ADEQUATE PUBLIC DISCUSSION AND AN OPPORTUNITY FOR SUBSTANTIAL COMMUNITY INPUT CONCERNING THE PROPOSED REORGANIZATION.

   Respondents reiterate their argument set forth in their post-hearing brief in this matter which thus is incorporated herein by reference.

2. THE EDUCATIONAL PLANS THEMSELVES FOR REORGANIZATION OF THE SCHOOL DISTRICT WERE EDUCATIONALLY SOUND, DID NOT DISCRIMINATE AGAINST ANY PUPILS IN THE SCHOOL SYSTEM OF RIDGEWOOD AND SHOULD BE AFFIRMED.

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Respondents reiterate their argument set forth in their post-hearing brief in this matter which thus is incorporated herein by reference.

3. THE MEETING OF MARCH 25, 1985 IN WHICH A PORTION OF THE REORGANIZATION PLAN WAS ADOPTED WAS A SPECIAL MEETING HELD PURSUANT TO LAW.

Respondents contend that "[p]etitioners truly exalt form over substance by alleging that a meeting denominated as an 'open work session' was one in which 'the Board was not empowered to take any formal action.'" (Respondents' Reply Exceptions, at p. 37, quoting Petitioners' Reply Exceptions, at p. 1)

Further, respondents aver that while it is true that all meetings must be open to the public, the right of the public to be present should not be confused with public participation, citing N.J.S.A. 10:4-6 et seq., N.J.S.A. 10:4-12(a) and N.J.S.A. 18A:11-1(c). Respondents reiterate again that petitioners were given more than ample opportunity for input.

4. RESPONDENTS PROVIDED ADEQUATE OPPORTUNITY FOR COMMUNITY INPUT ON THE PROPOSED K-2, K-5 PAIRING OF SCHOOLS.

Respondents refer to the publication mailed to all citizens of Ridgewood on this proposal and note that it was received in sufficient time to make the public knowledgeable prior to the Board's special meeting of March 11, 1985. The sole purpose of said meeting, respondents aver, was to receive as much input and comment from the public as the public wanted to give. Respondents contend that this publication and the February 25, 1985 comments on the K-2, K-5 issue met the requirements of N.J.S.A. 18A:7A-2(a).

Upon review of the record in this matter, and for the reasons that follow, the Commissioner finds that adoption of the resolution of the Board in approving part of the reorganization plan for the Ridgewood district taken at the March 25, 1985 "Open Work Session" is void for violations of the Open Public Meetings Act just before and during its deliberative process. The Commissioner will first consider the issue of the timeliness of the instant Petition of Appeal.

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N.J.S.A. 10:4-15(a) speaks to timelines for filing a proceeding in lieu of prerogative writ to avoid action at nonconforming meetings under the Open Public Meetings Act. Therein, in relevant part, it is stated:

> a. Any action taken by a public body at a meeting which does not conform with the provisions of this act shall be voidable in a proceeding in lieu of prerogative writ in the Superior Court, which proceeding may be brought by any person within 45 days after the action sought to be voided has been made public; provided, however, that a public body may take corrective or remedial action by acting de novo at a public meeting held in conformity with this act and other applicable law regarding any action which may otherwise be voidable pursuant to this section; and provided further that any action for which advance published notice of at least 48 hours is provided as required by law shall not be voidable solely for failure to conform with any notice required in this act. (emphasis supplied)

In the instant matter, petitioners have chosen to appeal their concern to the Commissioner of Education, not the Superior Court. Therefore, the 45-day statute of limitations is inapplicable; rather N.J.A.C. 6:24-1.2, the 90-day rule, applies. Thus, discussion of the meeting of the Board held in Southampton in 1984 is time barred. So, too, would discussion of any action taken by the Board at its January 21, 1985 Open Public Meeting, since the Petition of Appeal was filed on April 22, 1985, which is 91 days following the events that transpired on January 21, 1985, were it not for the fact that April 21, 1985 fell on a Sunday which allows petitioners one extra day to file a petition with the Commissioner. Thus, objections to reorganization discussions of the Ridgewood Board including and after January 21, 1985 were timely filed by petitioners for the Commissioner's consideration.

The Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., provides that, as a general rule, all meetings of public bodies must be held in public. In enacting the Sunshine Law, the Legislature declared that secrecy in the management of public affairs undermines the public faith, interest and participation in government operations. Therefore, the public must be given advance notice of and an opportunity to attend meetings of a public body at which any business of the public body is discussed or acted upon, except in certain limited circumstances.

A school board must comport with the Sunshine Law if it is a gathering open to or attended by all the members of the board and is held with the intent of discussing or acting upon public business. A meeting will not be subject to the act if it is

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attended by less than an "effective majority" of the members of the board. (N.J.S.A. 10:4-8(b)) Work sessions, Committees of the Whole, agenda committee meetings, etc., of a board of education are covered by the law if an effective majority of the board discusses any item of concern to the public or makes any decisions on the merits of matters on the agenda. Under such circumstances, such a committee is acting in more than an advisory capacity; the nature and extent of authority possessed by the committee under such circumstances make it subject to the Sunshine Law, N.J.S.A. 10:4-8(a). (See "Focus: The Open Public Meetings Act," at p. 8)

While all meetings must be open to the public at all times, except for those meetings at which topics covered under N.J.S.A. 10:4-12(b) are concerned, the right of the public to be present at the meeting should not be confused with public participation. The public body retains the right to permit, regulate or prohibit active participation of the public at any meeting. (N.J.S.A. 10:4-12(a)) The exceptions to the requirement of holding an open meeting are:

1. matters rendered confidential by Federal law or that, if publicly disclosed, would impair the receipt of Federal funds;

2. matters rendered confidential by State statute or court rule;

3. material that would constitute an unwarranted invasion of individual privacy if disclosed;

4. the terms and conditions of an existing or proposed collective bargaining agreement, including negotiation positions;

5. matters related to the purchase, lease or acquisition of real property with public funds;

6. matters related to the setting of banking rates or the investing of public funds, provided that public disclosure could adversely affect the public interest;

7. tactics and techniques utilized in protecting the safety and property of the public, provided that public disclosure could impair such protection;

8. investigations of violations or possible violations of the Law;

9. pending or anticipated litigation or contract negotiations in which the public body is or may become a party;

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10. matters falling within the attorney-client privilege, to the extent that confidentiality is required in order for the attorney to exercise his ethical duties as a lawyer;

11. personnel matters concerning the employment of a current or prospective public employee of the public body except that if all employees whose rights could be adversely affected request that such matters be discussed at a public meeting, then they must be discussed in public;

12. quasi-judicial deliberations occurring after a public hearing that may result in the imposition of a civil penalty or the suspension or loss of a license or permit.

The key issue before the Commissioner in the instant matter centers around the kind of meeting at which formal action was taken by the Board. At the January 21, 1985 "Open Public Meeting" of the Board, a resolution was passed unanimously agreeing to reorganize Ridgewood High School from a three-year to a four-year high school. Formal action by the Board was also taken at the March 25, 1985 "Open Work Session" wherein a resolution was passed accepting the superintendent's recommendations regarding reorganization of the elementary and junior high schools of Ridgewood. Further, formal action was taken at each of the ten "Open Work Sessions"/"Committee of the Whole Meetings" dating from January 7, 1985 through March 4, 1985, when the Board resolved to adjourn to go into executive session to "discuss matters relating to personnel." (See exhibits R-32 through 40) While proper notice was disseminated to the public announcing such meetings were to be held, each and every one of these meetings with the exception of the January 21, 1985 Open Public Meeting constitutes a breach of the Sunshine Law.

No formal action can be taken by a board at other than an open public meeting, a special meeting or at an emergency meeting. (N.J.S.A. 10:4-8(b), N.J.S.A 10:4-9(b)(1) and (4)) An open public meeting is one announced in advance by inclusion on the annually published schedule. A special meeting is one unanticipated on the annual schedule of regular open public meetings but for which 48-hour notice is provided. An emergency meeting is one which is required to be held in order to deal with matters of such urgency and importance that delay for the purpose of providing adequate notice would be likely to result in substantial harm to the public interest. Where under any of these three circumstances, the public body, constituting an effective majority, meets with the purpose of taking binding formal action, then the meeting must be open to the public. (Attorney General Formal Opinion #19-1976) The same Attorney General Formal Opinion further states that simply calling a gathering a training session will not exempt it from coverage under the law. Likewise, compliance with the Sunshine Law is required for

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meetings dubbed "Open Work Sessions," or " Committees of the Whole." The proper procedure for convening a meeting of the Board of Education follows:

> At the commencement of every meeting, the presiding person must announce publicly and have entered in the minutes an accurate statement that proper notice of the meeting has been provided and specifying the time, place and manner in which the notice was provided. If the meeting is one called in response to a crisis, the announcement shall state that adequate notice was not provided, the nature of the urgency, the harm to the public in delaying the meeting, the limitation on the matters discussed at the meeting, the time, place and manner notice was provided, and the exact reason why a need for the meeting could not be foreseen or why the adequate notice could not be provided. (N.J.S.A. 10:4-10)
>
> (See "Focus: The Open Public Meetings Act" New Jersey School Boards Association Publications, 1985, at pp. 11-12)

In the instant matter, the Board met at two properly noticed open public meetings held on January 21 and February 25, 1985. Three announced "Open Work Meetings" were also held on February 4, March 4, and March 25, 1985. An additional public hearing on reorganization was held on March 11, 1985. Further, the Board met on ten separate occasions in executive session to "discuss matters relating to personnel." (See Exhibits R-32 through 40.) Reorganization was the main topic of those ten discussions. The proper procedure for holding a closed session is set forth in N.J.S.A. 10:4-13, which states:

> No public body shall exclude the public from any meeting to discuss any matter described in subsection 7.b. [Section 10:4-12.b] until the public body shall first adopt a resolution, at a meeting to which the public shall be admitted:
>
> a. Stating the general nature of the subject to be discussed; and b. Stating as precisely as possible, the time when and the circumstances under which the discussion conducted in closed session of the public body can be disclosed to the public.

More specifically, the procedure for holding a closed session requires that

> Prior to going into private session, a public body must adopt a resolution at a public meeting stating the general nature of the subject to be discussed and stating as precisely as possible

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> the time and circumstances when the discussion can be disclosed to the public. (N.J.S.A. 10:4-13) (See, for example, Cole v. Woodcliff Lake Board of Education, 155 N.J. Super. 398 (Law Div. 1978)). If this resolution is passed at a prior public meeting for which notice has been provided, the public body may hold a meeting limited to the matter to be dealt with in closed session without providing additional notice therefor. (Houman v. Mayor & Coun. Bor. Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977)). In the event a resolution has not been passed by the public body at such prior public meeting, the public body must then provide adequate or 48-hour notice of the meeting and at that meeting pass the required resolution in open session prior to going into closed session. (A.G.F.O. 19-1976; Cole v. Woodcliff Lake Bd. of Ed., supra)
>
> (Quoting from Focus On: The Open Public Meetings Act: New Jersey School Boards Association Publications, 1985, at p. 13)

Thus, a board of education may adjourn into private/executive session by following one of two procedures. The board may, at the previous open public meeting, announce and pass a resolution stating that the board will, at the next available opportunity conduct an executive session, indicating at the earlier meeting when minutes of the executive session can be made available to the public OR it must, with proper announcement, convene at a regularly scheduled open public meeting or a special open public meeting or an emergency public meeting, announce its intention to adjourn for a closed session, make a resolution to that effect in the open public session, pass it, and then retire into closed session.

Since it is incumbent upon a board that all formal resolutions be made only at regularly scheduled or special open public meetings for which proper notice and an agenda has been established or at an emergency meeting, the board is not empowered to make formal resolutions -- even insofar as adjourning into executive session is concerned -- at any other kind of meeting, be it a Closed Session, an Open Work Session, or a Committee of the Whole Session. The Commissioner concurs with The ALJ in stating:

> At none of the ten-odd occasions when the Board resolved to retire into executive or closed session to discuss "matters pertaining to personnel" was a resolution adopted at a public meeting stating as precisely as possible the time when and the circumstances under which the discussion conducted in closed session could be disclosed to the public. [N.J.S.A. 10:4-13]. See R-20, 21, 22, 23, 24, 25, 26, 27, 28 and 29. And at no time after executive or closed session did the Board in its minutes promptly make

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available to the public the matters discussed confidentially in such meetings. [N.J.S.A. 10:4-14]. At no time before giving notice of executive or closed session of the Board where members of the public would be excluded in order to permit the Board to discuss "matters pertaining to personnel" did the Board give, nor apparently find it necessary to give, notice to any specific prospective or current public officer or employee that his/her rights would be the subject of "personnel" deliberation. [N.J.S.A. 10:4-12(b)(8)].[2] The only persons present at all executive or closed sessions of the ten-odd such sessions were Board members, superintendent, assistant superintendent-secondary Board secretary/business administrator, director of personnel, executive assistant, director of management information services and assistant superintendent-elementary. P-26, 5, 6, 7, 9, 10, 11, 12, 13 and 14. On all occasions, the subject of school reorganization was prominently discussed. On the majority of occasions, the subject of school reorganization was the only matter discussed.

While the Commissioner notes that public announcements were issued before each of the closed-session meetings held from January 7, 1985 through March 4, 1985, even if the Board had adjourned after a resolution was passed at an open public meeting for each of these sessions, its deliberations were still inappropriate since the announced purpose of such executive sessions was "personnel." Minutes of these meetings reflect that the reorganization discussions therein included review of the reorganization's impact on pupils and the community, as well as on the staff of the district. The exceptions to the requirement of holding an open meeting pursuant to N.J.S.A. 10:4-12(b)8 nowhere allow for discussion concerning subjects other than specific persons in the employ of the Board. Thus, while the Board in closed session might discuss the impact the reorganization might have on the principals in the middle schools, it may not discuss the impact the reorganization might have on the community of Ridgewood in general or upon pupils in general.

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[2] On one other occasion, at an annually noticed open work session held on March 4, 1985, the Board concluded its business by adjourning from public session to retire into executive session to discuss "matters pertaining to personnel," without any minute-keeping of proceedings at the closed meeting and without any prior notification to any ostensibly affected specific current or prospective public officer or employee. [N.J.S.A. 10:4-14; 4-12(b)(8)]. See P-15 at 159.

(emphasis in text)(Initial Decision, ante)

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The Commissioner is persuaded, as was the ALJ, that the reorganization scheme proposed by the Board provided adequate community involvement, albeit adopted illegally. Deliberations were undertaken as early as 1978, with a plethora of public input and publication of the issues. Notwithstanding the ample opportunity provided to the public to make known its views on the subject, the Commissioner further agrees with the ALJ that contrary to N.J.S.A. 10:4-14, the Board failed to promptly make available to the public the minutes kept at the executive or closed session conducted by the Board. The Commissioner notes that contrary to the suggestion of petitioners that the Board should determine when the subject matter of a meeting is no longer confidential, and also contrary to the Board's policy that the business administrator or superintendent make such a determination, events, not individuals dictate when matters previously deemed confidential shall be made available to the public. Once the actions considered are publicly acted upon, the minutes by virtue of such action must be made available.

Consequently, the Commissioner finds that the Board violated its obligation to conduct all deliberations in public when it determined to retire into executive session ostensibly "to discuss matters pertaining to personnel." The deficiencies in the Board's actions were in the manner in which it considered, acted upon and made available to the public, information pertaining to the reorganization of the Ridgewood schools. The Commissioner directs that the actions taken at all said meetings with the exception of the January 21, 1985 Open Public Meeting are null and void. In light of the magnitude of the violations herein, and in accordance with Polillo, supra, the Board is directed should it hereafter determine to reembark upon its task of considering an appropriate form of reorganization of the school district, to do so only upon consideration and action of the questions at properly noticed public meetings without violation of the Open Public Meetings Act as hereinabove found. In so doing, the Commissioner further directs that the Board may, in its sound discretion, use so much of the testimony and evidence acquired over the course of general district consideration of the question of reorganization in original investigatory efforts as hereafter it deems necessary and appropriate. Finally, the Board is directed (1) to make available to the public minutes of executive or closed session minutes as promptly as the need for confidentiality has ended and (2) to comply precisely hereafter with N.J.S.A. 10:4-12, .13, 14 pertaining to the keeping and prompt release of executive or closed session minutes.

As to the meeting in Southampton, Long Island, New York, the Commissioner finds such action by the Board to be a clear breach of the Open Public Meetings Act. The purpose of the Sunshine Law is to announce meetings so that the public may attend. To announce that the Board shall hold a meeting in Southampton, which is exceedingly remote from Ridgewood, New Jersey, makes a sham of the law. The Board is directed by the Commissioner to cease and desist from such improper action.

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Accordingly, the initial decision of the Office of Administrative Law is adopted, as modified herein, as the Commissioner's final decision in this matter for the reasons expressed therein and as qualified above.

COMMISSIONER OF EDUCATION

April 14, 1986

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INITIAL DECISION
OAL DKT. NO. EDU 2952-85
AGENCY DKT. NO. 109-4/85

JAMES LEWIS, JR.,
Petitioner,
v.
EDUCATIONAL IMPROVEMENT CENTER-NORTHEAST,
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

Louis W. Childress, Jr., Esq., for petitioner
(Brown, Childress & Philp, attorneys)

E. Philip Isaac, Law Assistant, for respondent, State Department of Education, as Administrator of the Assets of the Educational Improvement Center-Northeast
(W. Cary Edwards, Attorney General of New Jersey, attorney)

Record Closed: January 14, 1986 Decided: February 27, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

PROCEDURAL HISTORY

On April 16, 1985 the petitioner, Dr. James Lewis, Jr., former Executive Director of the Educational Improvement Center-Northeast (hereafter referred to as EIC-NE) filed a petition with the Commissioner of Education challenging denial by the Department of Education of accrued vacation benefits and/or compensation at the time of his separation from employment with EIC-NE (now defunct). On May 22, 1985 the matter was

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transmitted by the Commissioner of Education to the Office of Administrative Law for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The Attorney General filed an answer to the petition on May 21, 1985, denying the substantive allegations of the petition and pleading various separate defenses.

A prehearing conference was held on July 9, 1985, and a prehearing order was filed, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing.

The issues were listed in the prehearing order as follows:

1. Whether or not Dr. Lewis is entitled to vacation benefits in light of the Education Improvement Center-Northeast, Board of Directors' decision of April 20, 1983;

2. Whether the Board was vested with legal authority to grant Dr. Lewis accrued vacation days;

3. Whether the EIC-NE was required to satisfy its debts to employees before satisfying all other debts;

4. Whether vacation pay is, as matter of law, compensation for services rendered;

5. Whether the state assumed responsibility for the debts of the EIC-NE;

6. Whether petitioner was unlawfully denied vacation benefits as a result of the personal animus of Richard Kaplan;

7. Whether other EIC-NE employees received accrued vacation benefits;

8. Whether Dr. Lewis's vacation benefits should legally be treated in the same

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manner as claims from vendors.

One question not raised by either party, but questioned by the judge at the beginning of the hearing, is whether or not this matter constitutes a dispute under the jurisdiction of the Commissioner of Education to hear and determine controversies and disputes arising under the school laws, pursuant to N.J.S.A. 18A:6-9. Neither party was anxious to address that question; neither party commented on it in its brief. Obviously both parties preferred to proceed with a determination in this forum. The hearing was held for two days, December 5 and 6, 1985, at the Office of Administrative Law in Newark, New Jersey. The jurisdictional question will be addressed further in the latter part of this decision, in the legal discussion and conclusions.

In addition to the testimony of witnesses, various documentary exhibits were marked in evidence, a list of which is attached hereto. One of these exhibits, J-A, is a stipulation of facts that was adopted and agreed to by the parties. Those facts are as follows:

1. Petitioner, Dr. James Lewis, Jr. contracted on July 22, 1982 with the Educational Improvement Center, Northeast (EIC-NE) to serve as the Center's Executive Director for a term of three years beginning July 1, 1982 and ending June 30, 1985. Petitioner, however, had been employed by EIC-NE under a different contract prior to this date but such prior agreements had terminated.

2. Pursuant to the terms of the Contract of James Lewis with EIC-NE, the performance by Mr. Lewis was subject to the Board's evaluation after an examination of his service record.

3. During its February 16, 1983 meeting, due to critical fiscal exigencies, the Board of Directors of EIC-NE voted to terminate the operation of EIC-NE effective April 16, 1983.

4. By the above indicated Board action of February 16, 1983, all EIC-NE employees were terminated as of April 16, 1983.

5. It was further the EIC-NE Board's action on February 16, 1983 to direct the Board's President, Robert M. Black, Jr., to request that the New Jersey Commissioner of Education assign a care-taker to supervise continuation of any EIC-NE

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activities effective immediately, the date of the Board's meeting on February 16, 1983.

6. In a letter dated February 17, 1983, EIC-NE Board President, Robert M. Black, Jr., asked Dr. Saul Cooperman, Commissioner of Education, State Department of Education, to appoint a monitor to help oversee daily operations of EIC-NE until such time that the center closed.

7. Subsequent to Mr. Black's request for a monitor to oversee EIC-NE's daily operations, the Commissioner of Education appointed Dr. John J. Casey as a Fiscal Monitor for the closeout of EIC-NE.

8. On April 20, 1983 the EIC-NE Board of Directors held a meeting during which time, in addition to discussing the Center's closeout and hearing from its attorney, the Board voted to approve payment for 40 days of vacation days effective immediately on April 20, 1983 to Dr. James Lewis, Jr. The Board took note that this payment amounted to $8,248.00 and was part of the Center's deficit.

9. In a letter dated May 21, 1983 from Dr. James Lewis to Mr. Edward Kent, Chief Auditor, N.J. State Department of Education, Dr. Lewis informed Mr. Kent as to the Board's vote and indicated that the 40 days in question amounted to $8,283.88.

TESTIMONY OF WITNESSES

Robert M. Black, Jr., a former member of the Board of Directors of EIC-NE, testified on behalf of the petitioner. Dr. Black was President of the Board in 1980-81. He explained that EIC-NE was created by the Legislature and the Department of Education to provide consultant assistance to schools in order to improve programs. Financial difficulties caused a fiscal crisis, beginning in the fall of 1982. The Board acted to cease incurring additional financial obligations because of a growing deficit. All employees were terminated in February 1983, with 60 days terminal leave, resulting in an effective termination date in April 1983.

Dr. Black referred to a section of the policy manual dealing with vacations (Exhibit P-1) in existence at the time. The manual provided that an employee may request a

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maximum of one year of earned vacation allowance to be carried forward into the next succeeding year. He indicated that the manual covered all employees, and therefore should apply to the Executive Director.

However, according to Dr. Black, the petitioner had over fifty days of accumulated vacation time accrued when the Center was about to cease operations in 1983. (He had been employed since 1976/7.) By that time the Assistant Director had resigned and Dr. Lewis was the only person available to administer the windup and termination procedures. Had he left abruptly in order to use his accrued vacation time, no one would have been present to oversee the dissolution. The matter was discussed between them and Dr. Lewis agreed to accept payment in lieu of accumulated vacation for a total period of 40 days.

The agreement was then brought to the attention of the full Board of Directors for approval. It was noted that the Assistant Executive Director, Dr. Bloom, had received payment in lieu of 20 or 30 accrued vacation days when he left the Center in February 1983.

According to Dr. Black, the Board considered the matter and voted to approve payment of 40 days in accumulated vacation pay to Dr. Lewis. The vote was taken at the last full Board meeting of the organization, which took place on April 20, 1983, with 14 members present. According to a previous resolution of the Board, April 16, 1983 was to be the effective date of cessation of operations of the Center, and the last Board meeting was scheduled for that date. The meeting was delayed for four days, until April 20, because the Board had neglected to comply with the requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., for the earlier meeting date.

Dr. Black supplied more details about the windup procedures. The fiscal monitor appointed by the state, Dr. John J. Casey, was present at the April 20, 1983 Board meeting. Decisions were made at that time to make certain payments to creditors, such as for rent and utilities. The resolution to pay the 40 days of vacation time to Dr. Lewis was also accomplished at the meeting, in the presence of Dr. Casey. These actions are memorialized in the minutes of the meeting, Exhibit J-17.

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Dr. Black kept himself available along with the petitioner after April 20, 1983 to assist in an orderly closeout of the Center. During that summer claims for incurred expenses were settled and paid, the Center moved out of its location, and physical assets were sold. The fiscal monitor and Richard M. Kaplan, a special liaison official between the Commissioner's office and the Center, also assisted in the windup activities.

Returning to the question of the petitioner's accrued vacation, the respondent attempted to demonstrate that the Executive Director could not possibly have accumulated 40 or 50 unused vacation days, according to the policy manual. That argument was never definitively determined. Dr. Lewis was the Executive Director, and no one checked on his vacation time or maintained documentary records that were available for inspection. At the end, when he informed the Board of the amount of vacation time that he had been unable to use over his years of service, the Board simply trusted and believed him. However, the respondent continued to argue that the Board had no right to permit the Executive Director to be treated differently from any other employee. Dr. Black testified that unlike other employees of the Center, the Executive Director had been prevented by the constant pressure of his work over the years from taking most of his earned vacation time. He said that the Board understood the problem, which was unique in the case of the Executive Director. The Board orally agreed to his requests and permitted him to carry over vacation time beyond that limited by the policy manual.

The petitioner, Dr. James Lewis, Jr., testified in his own behalf. He indicated that professional employees were able to accrue 22 vacation days in one year, so that if all such days were carried over into the next year, an employee could be entitled to a maximum of 44 days. Dr. Lewis also felt that because of the demands of the position that he held as Director, the strict limitations of that policy did not necessarily apply to him. By 1983 he had not used 62 or 63 vacation days to which he was entitled. He confirmed Dr. Black's testimony regarding the consideration that he requested of the Board and was granted. The petitioner stated that this was primarily done in informal discussions with the Board and that there is no definitive supporting documentation in existence. However he insisted that the Board acquiesced, in 1982 and thereafter, in his requests for leeway

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with regard to vacation time.

Dr. Lewis also confirmed that the reason for the last-minute delay of the April 16, 1983 Board meeting, for four days until April 20, was compliance with the notice provisions of the Sunshine Law.

Dr. John J. Casey was appointed by the Commissioner of Education as fiscal monitor of the operations of EIC-NE during its close-out period. Dr. Casey is Superintendent and Board Secretary of the Educational Services Commission of Somerset County and a certified school business administrator. He testified that when he arrived at EIC-NE on March 10, 1983 he found unbelievable disorder. There was confusion, a worried staff, lack of information and poor financial records. There were papers all over the place and staff members appeared to be in confusion. The number of staff slowly dwindled. By September 1983 the premises was actually closed.

Dr. Casey spoke in detail of the events at the April 20, 1983 Board meeting. He informed the Directors that they were facing a deficit, and that if they incurred additional expenses it would only add to the deficit. The Business Manager of EIC and the state auditors had estimated the deficit to be approximately $120,000 at that time. Dr. Lewis's vacation pay claim was also discussed at the meeting, and the Board voted and approved payment to the petitioner. Dr. Casey indicated that some Board members wanted to write a check to Dr. Lewis immediately. He admonished the Board that it should not do that because there was no one present who had authority to write such a check. At the same time he reminded the Board of the size of the deficit that it was facing and of the presence of additional claims against the assets of the Center.

Resolutions were also passed at the Board meeting to pay rent and telephone bills. These payments were approved by Dr. Casey, and he made the payments. He also paid past-due contributions to the PERS for pension benefits. At no time did Dr. Casey challenge the meeting that was being held by the Board on April 20 as being ultra vires or unauthorized. Instead he acted in accordance with the procedures taken by the Board at the meeting, although he did not always agree with the Board's decisions. Dr. Casey felt

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that it was good practice, and even necessary, for the Board to act to ratify and authorize payment for items such as rent and telephone, in order to facilitate the orderly windup of the operation. However he did not feel the same way about Dr. Lewis's claim for 40 days of vacation pay, which did not have the same degree of urgency.

Sometime later Dr. Casey attempted, unsuccessfully, to verify the actual number of vacation days Dr. Lewis had accrued. The state auditors who were working on the EIC-NE asset and liabilities statement had questioned the claim because of lack of documentation. There were no payroll records, no information from the personnel office and no substantiation other than Dr. Lewis's assertions. After reviewing the situation, Dr. Casey determined that the petitioner's claim should not be paid, although all other resolutions of the Board at the April 20, 1983 meeting were carried out.

Richard M. Kaplan, a representative of and special assistant to the Commissioner of Education also testified. He was responsible for oversight liaison and additional monitoring of the activities of EIC-NE during its existence. Part of his function was to review and approve budgets and program plans. Mr. Kaplan testified that in December 1982 the Commissioner made a decision to discontinue support for the EIC-NE, as part of a reorganization of existing educational services. A process was begun to have the legislation that created EIC (in all regions) repealed. The fiscal monitor was appointed for EIC-NE in February 1983 following a request by the Board of the Center. There was obvious insolvency and a large deficit. Mr. Kaplan stated that once the fiscal monitor took over the Board did not function as such, without his concurrence. The scheduled date for termination of operations was April 16, 1983. The Board of Trustees did not plan to meet thereafter. However, Mr. Kaplan agreed that the last meeting of April 16 was delayed to April 20 only because of the failure to notify newspapers and comply with the Sunshine Law. He was not present at that Board meeting; he was on vacation at the time.

Despite the above, Mr. Kaplan takes the firm position that the Board had no authority to act after April 16, 1983. He was also aware of the fact that the Lewis claim was first processed for payment, but later held up and rejected because an opinion was rendered by the Attorney General's office that no claims should be paid until a complete

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review process had been engaged in.

DOCUMENTARY EXHIBITS

The following FACTS can be extracted from the exhibits:

A. The statement in the employment agreement of July 22, 1982 that "If at any time during the term of this agreement, funds are not available to meet the terms of this agreement, this agreement shall become null and void" does not control determination of whether or not Dr. Lewis should be compensated for the 40 days of accrued vacation time (Exhibit J-1). The above statement in the agreement is not sufficiently definitive, and it does not deprive the Board of its discretion and authority.

B. Even though the Board resolved to terminate operations at the Center as of April 16, 1983 (Exhibit J-2), there was recognition that daily operations had to be managed until such time as all aspects concerning the closing were implemented and the Center was officially closed (Exhibits J-3).

C. The petitioner's agreement with Dr. Black, President of the EIC-NE Board of Directors, that he would receive compensation for 40 unused vacation days because it would be impossible for him to actually take the days off before the Center closed was reported to the fiscal monitor by letter of March 21, 1983 (J-5).

D. The Commissioner's office attempted to abruptly terminate the authority of the Board of Directors of EIC-NE as of April 16, 1983 (Exhibit J-9). However the April 20, 1983 meeting of the Board should be considered as having been in lieu of and held as a replacement for the April 16 meeting that could not be convened because of noncompliance with the Sunshine Law. Furthermore, the fiscal monitor attended and participated in decisions made by the Board on April 20, 1983. He never disavowed their legitimacy or authority, although he

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sat in an advisory capacity.

E. After review, the Department of Education did not question the legitimacy of Dr. Lewis's accrued vacation claim, but it did express doubt about the Department of Education's ability or obligation to liquidate the liability (Exhibits J-11, J-12, J-13 and J-14).

F. Many months later, in February 1984, the office of the Commissioner of Education first decided to question every aspect of the petitioner's claim and review it again. Lack of any definitive provision in the employment contract and general Board policy was cited in support of the Commissioner's review (J-15).

G. The Board's approval of payment for Dr. Lewis's 40 days of accrued vacation was clearly and affirmatively resolved at the April 20, 1983 Board meeting and it is memorialized in the minutes (Exhibit J-17).

H. The EIC-NE Board of Directors was not necessarily restricted and bound by its vacation policy, and it had the authority to extend accumulated vacation days beyond policy limits in individual cases on recommendation of the Executive Director (Exhibit P-1). There is also documentary evidence to indicate that the Board was considering liberalizing the policy (Exhibits R-1, R-2 and R-4).

ADDITIONAL FINDINGS OF FACT

In addition to the facts stated in the foregoing discussion of the procedural history, the testimony and the exhibits, the following are found to be additional FACTS:

1. The Board of Directors of EIC-NE was fully authorized and responsible for the creation and maintenance of policies as well as for the operation and management of the Center.

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2. The authority and responsibility of the Board, as set forth above, extended into the period of winding down and dissolution of the Center's activities.

3. The Board meeting of April 20, 1983 was a legitimate and proper substitution for the meeting that had originally been scheduled four days earlier, April 16, 1983. The fact that an earlier resolution identified April 16, 1983 as the effective date for cessation of business did not in any way render the April 20, 1983 meeting illegitimate or void.

4. The Board had full authority to pass the resolution approving payment of the 40 days in accrued vacation time to the petitioner. This authority was consistent with the overall managerial and policymaking responsibility of the Board.

5. The petitioner's employment contract was not sufficiently definitive on the subject of payment for unused accrued vacation time. Even if it had been sufficiently definitive, the Board had the authority to amend the terms of the contract.

6. The appointment of the fiscal monitor had the effect of creating a higher authority who could have superseded the power and authority of the Board. However the fiscal monitor was present at the April 20, 1983 Board meeting. He did not act to challenge or attempt to supersede the Board's authority at that time. On the contrary, his presence at the meeting lent a greater stamp of approval and legitimacy to the Board's actions than might have been the case if he had not attended.

7. The fiscal monitor only disagreed with the Board's desire to make immediate payment of the petitioner's claim at the Board meeting. Although he cautioned the Board to be aware of the amount of the existing deficit, he did not attempt to intervene or specifically disapprove of the resolution to honor the petitioner's claim.

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LEGAL DISCUSSION

Management of corporate affairs is committed by law to directors assembled at a board meeting. Questions of policy are properly determined by the directors, and a court only intervenes in corporate internal affairs with reluctance. RKO Theaters v. Trenton-New Brunswick Theaters Co., 9 N.J. Super. 401 (Ch. Div. 1950). Corporate business is normally entrusted to a board of directors, and if the directors exercise their judgment honestly and sincerely in the absence of a purpose which is unlawful or against good morals, courts will not substitute their judgment for that of the board. Mimnaugh v. Atlantic City Electric Co., 7 N.J. Super. 310 (Ch. Div. 1950); Riddle v. Mary A. Riddle Co. 142 N.J. Eq. 147 (Ch. 1948).

When a corporation undergoes dissolution proceedings requiring the settlement of affairs, disposition of its property and dividing of its capital, the directors of the corporation continue its existence beyond any actual effective dissolution date for such purposes, but not for purposes of continuing the business for which the corporation was established. K. and J. Markets v. Martin Packing Corp., 18 N.J. Super. 124 (Law Div. 1952), aff'd 20 N.J. Super. 515 (App. Div. 1952). Donath v. Shaw, 132 N.J. Eq. 545 (Ch. 1942). There is no question that the existence of a corporation beyond the expiration of its own proscribed limitation is permitted in order to enable the corporation to conduct such business as is incidental and necessary to the winding up of its affairs. Leventhal v. Atlantic Rainbow Painting Co., 68 N.J. Super. 406 (App. Div. 1961); Historic Smithville Development Co. v. Chelsea Title and Guaranty Co., 184 N.J. Super. 282 (Ch. Div. 1981), aff'd in part, rev'd in part 190 N.J. Super. 567 (App. Div. 1983).

The respondent is misdirected in arguing that the EIC-NE Board failed to adhere to the Center's vacation rules and policies in approving the petitioner's accrued vacation claim, in violation of N.J.A.C. 6:80-1.12. The Board creates the rules and policies, and in so doing may vary, change or amend those rules and policies at any time, so long as it is not illegal, fraudulent or in bad faith. N.J.A.C. 6:80-1.12 (now repealed) specifically provided that "the Board of Directors of each educational improvement center shall adopt policies for the operation and management of the Center, including a policy for terms and

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conditions of employment of personnel." There is no prohibition preventing the Board from varying, amending, changing or otherwise continuing to manage the terms and conditions of employment of personnel.

The respondent also argued that the Board's actions, after appointment of the fiscal monitor, were of no binding effect, and that the Board could only make recommendations. As mentioned above, the fiscal monitor sat with the Board at the April 20, 1983 meeting. His function, as actually performed, was advisory, not dictatorial. He never specifically disapproved or attempted to veto any action taken by the Board at that meeting. The one strong suggestion he had, relating to the Board's inability to write an immediate check, was complied with. However, at no time did he inform the Board that he would not permit or disapprove of the resolution to grant the 40 days of vacation pay to Dr. Lewis. If he had the power to disapprove it, he did not exercise that power at the time the Board acted.

Another argument advanced by the respondent is that the petitioner was not entitled to his request for accrued vacation payment because his contract became invalid upon the insolvency of EIC-NE. Again, as mentioned previously, the existence or nonexistence of the contract of employment did not necessarily prevent the Board, in the exercise of its legitimate authority, from granting the vacation pay request. The Board had the authority to perform such a managerial prerogative, even without a contract.

A substantial amount of argument was heard on the subject of whether or not the State became responsible and liable for payment of obligations incurred by the EIC. The petitioner has alleged that the State Department of Education, upon accepting a transfer to it of the EIC upon its dissolution, became its successor in interest and as such became responsible for its liabilities, as well as its assets. N.J.S.A. 15A:10-6 and N.J.S.A. 52:14D-4.

The Attorney General rendered an opinion to the contrary, stating that satisfaction of the debts of the EIC's should be made out of the assets transferred to the Commissioner of Education by virtue of L. 1983, c. 186 (the legislation that repealed the

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statutes creating the EIC's). The Attorney General, in an opinion rendered to the Division of Budget and Accounting in the Department of the Treasury, indicated that the remaining assets of each EIC transferred to the Commissioner of Education in dissolution should be used by the Commissioner to satisfy the legitimate obligations of that EIC from which those assets were transferred, but that in the absence of explicit legislation the State would not be responsible for debts beyond the extent of the remaining assets, citing Estelle v. Board of Ed. of Borough of Red Bank, 26 N.J. Super. 9, 16 (App. Div. 1953), modified on other grounds 14 N.J. 256 (1954); Union Bldg. and Constr. Corp. v. Borough of Totowa, 98 N.J. Super. 446, 449 (Law Div. 1968.)

An analysis of the above issue leads to the question raised at the beginning of the hearing relating to the jurisdiction of the Commissioner of Education to hear and determine disputes that arise under school laws pursuant to N.J.S.A. 18A:6-9. The issue forwarded to the Office of Administrative Law by the Commissioner of Education related to whether or not the petitioner had been denied accrued vacation benefits and or compensation upon separation from employment from the EIC-NE. Because that question was transmitted by the Commissioner for determination on a factual basis, and it was not disputed or challenged on jurisdictional grounds by either party, that question will be answered here. However, the question of state liability for payment of debts of the EIC's goes one step further. It does not involve a factual determination; it is a pure question of law.

> [P]resent law permits matters to be adjudicated by the Commissioner of Education only in a limited class of cases. The Commissioner has jurisdiction over certain disputes in the absence of an agreement or if the subject matter is not susceptible to a binding agreement because it concerns a major educational policy or because the issues are controlled by the school laws (citations omitted) . . . . The determination of whether any controversy falls within the jurisdiction of the Commissioner by reason of it being non-negotiable or subject to the school laws is not a matter to be decided by the Commissioner. See, Dunellen Board of Ed. v. Dunnellen Ed. Ass'n, 64 N.J. 17, 31 (1973.) Newark Teachers Union v. Board of Ed. of Newark, 149 N.J. Super. 367 (Ch. Div. 1977) at 371-72.

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I **CONCLUDE** that it is beyond the scope of the contested case involved here to adjudicate this next step, dealing with the state's liability for payment if the petitioner's claim is to be allowed. That question has no relationship to the school laws. It deals purely with the responsibility of the state or the State Department of Education for payment of the debts of the insolvent and defunct EIC's. That question would best be decided by the courts.

CONCLUSIONS

Based upon all the foregoing it is **CONCLUDED** as follows:

The petitioner has proved, by a preponderance of the credible evidence, that he was entitled to payment in lieu of vacation for the 40 days of unused accrued time. The operation of the EIC-NE, particularly in the windup process, may have been sloppy and self-indulgent. Documentation may have been lacking, and internal policies may not have been strictly applied to the Executive Director in the same manner as they were applied to other staff. However, the Board of Directors had the authority to grant the petitioner's application, and it acted legitimately and within the scope of that authority when it approved the 40 days' payment by a properly taken vote at a lawful meeting. The Board agreed to loosen its policies for its Executive Director, for reasons that were not wholly illogical. There was a need for his presence in the windup process. Difficulties would have been caused had he availed himself of the accumulated vacation time.

There was no proof that the petitioner took advantage of the situation, defrauded the Board of Directors or acted in bad faith or against good morals. There is also no proof that the Board of Directors exercised dishonest judgment, fraud or bad faith. Its action was within the scope of its authority. The action was also acquiesced in, although possibly not liked, by the fiscal monitor. Just because the Board was indulgent and treated the Executive Director with a degree of favoritism does not mean that its act was unauthorized or made in bad faith. Furthermore the Board was legally in existence and was acting within the scope of its authority, under the watchful eye of the fiscal monitor, when the resolution was passed. The respondent should not be permitted to return many

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months later and second-guess or attempt to veto an action that was lawful at the time it was taken.

The technical requirements of the written policies regarding accrued vacation time may not have been strictly complied with by the petitioner, and by the time the matter turned into a controversy any available documentation was gone. However the Board, within the scope of its managerial authority, had the right to grant the petitioner's request. The primary question involved is whether or not the Board had the power and authority to do what it did. That question is answered in the affirmative. The fact that the Board was taking unusually good care of its Executive Director does not necessarily invalidate the action, in the absence of fraud or bad faith.

It is therefore ultimately **CONCLUDED** that the denial of petitioner's claim for vacation benefits, pursuant to the resolution of the Board of EIC-NE, was unjustified, and the claim should be allowed. It is further **CONCLUDED** that the debt created by the allowance of petitioner's claim is a debt owed by the EIC-NE to claimants against its assets. As set forth above the question of whether or not the state or the State Department of Education is responsible for payment of that debt is not dealt with here.

It is therefore **ORDERED** that the petitioner is entitled to become a claimant for payment of $8,248 for 40 days of unused and accrued vacation time, due and owing from EIC-NE, in accordance with its resolution passed on April 20, 1983. No order is rendered in connection with petitioner's demand for determination and identification of the entity that is ultimately liable for payment of that claim.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

February 27, 1986
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

FEB 28 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 3 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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JAMES LEWIS, JR.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
EDUCATIONAL IMPROVEMENT CENTER-NORTHEAST, NEW JERSEY DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that respondent has filed exceptions to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Respondent argues in its exceptions that the ALJ committed serious errors in reaching his findings and conclusions in the initial decision and urges the Commissioner to set aside the ALJ's recommendations for those reasons stated in summary fashion below.

POINT I

> IN FAILING TO ADDRESS THE PROVISION IN DR. LEWIS'S CONTRACT OF EMPLOYMENT WITH EIC-NE WHICH TERMINATED THE CENTER'S FINANCIAL OBLIGATIONS UPON ITS INSOLVENCY, THE ALJ's DETERMINATION IS SERIOUSLY FLAWED AND SHOULD BE REVERSED.
> (Respondent's Exceptions, at p. 2)

The specific provision in petitioner's contract at issue herein reads as follows:

> If at any time during the term of this agreement, funds are not available to meet the terms of this agreement, this agreement shall become null and void***. (J-1)

It is respondent's position that the record of this matter clearly establishes that the center was confronted with a financial crisis commencing in the fall of the 1982-83 school year. Moreover as of April 20, 1983, the fiscal monitor appointed by the Commissioner informed the Center's Board of Directors at its final meeting that such deficit amounted to approximately $120,000. (Initial Decision, ante)

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The assignment of the fiscal monitor by the Commissioner was occasioned by an action taken by the Center's Board of Directors on February 16, 1983 whereby it notified the Commissioner that the Board agreed to terminate operations at the Center and dismiss its staff within a 90-day period thereafter. The Board of Directors also requested that the Commissioner "***assign a member of the Department of Education to supervise any continuation of EIC/NE activities, effective immediately." (J-2, at p. 4)

In this regard respondent maintains that the action taken by the Board of Directors declaring its insolvency on February 16, 1983 to the Commissioner triggered the provision in petitioner's contract (J-1) declaring it "null and void," and consequently forclosed him from being compensated for the accrued vacation time to which he lays claim.

Respondent argues that both the ALJ's determination not to address this issue and his comments to that effect made during the course of the hearing testimony are considered prejudicial to its case. The specific statement made by the ALJ in this regard is cited by respondent from the transcript of December 6, 1985 on the second day of hearing:

> ***This is a wonderful law school exercise and I am going to keep my sights on the issue of vacation reimbursement. That is all I am concerned with. I am not concerned with the employment contract .... IIT35:9-13. (Emphasis added.)***
> (Respondent's Exceptions, at pp. 3-4)

The Commissioner observes that respondent has also documented by way of footnotes which appear on pages 4-7 of its excerpts certain sections from the transcripts of these proceedings containing those remarks made by the ALJ which it considers to be highly inappropriate, hostile, or prejudicial to its case.

Respondent further maintains that because petitioner's contract (J-1) contained no specific provisions with regard to his vacation time, the Board of Director's Policies and Procedures, including provisions addressing vacation time, were part and parcel of his contract which respondent asserts is "null and void." Respondent relies on the Board's policy statement #6201(R-5) in support of its contention. It reads in part as documented in respondent's exceptions:

> ***The policies of the EIC-NE Board of Directors shall constitute a contract agreement between employer and employees. Letters of appointment and salary shall be provided to employee annually and at the time of employment. [Emphasis added]. See also IIT32:14-20.***
> (Respondent's Exceptions, at p. 9)

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Respondent urges the Commissioner to explain the meaning of "null and void" in light of the ALJ's refusal to do so.

Finally, respondent argues that petitioner be denied his request for accrued vacation pay on the grounds that he knowingly entered into a contract with the Board of Directors, and even helped draft some of the terms of the contract that he now refutes because it is not enforceable.

POINT II

> AS THE EIC-NE BOARD FAILED TO ADHERE TO THE CENTER'S VACATION RULES AND POLICIES IN APPROVING PETITIONER'S ACCRUED VACATION CLAIM, THUS VIOLATING N.J.A.C. 6:80-1.12, THE DEPARTMENT OF EDUCATION IN ITS CAPACITY AS THE ADMINISTRATOR OF THE ASSETS OF EIC-NE MAY NOW REFUSE TO HONOR THE BOARD'S DECISION IN THIS MATTER.
>
> (Respondent's Exceptions, at p. 12)

The applicable State Board regulation (N.J.A.C. 6:80-1.12) then in effect which pertained to the policy making authority granted to the Board of Directors reads as follows:

> The board of directors of each educational improvement center shall adopt policies for the operation and management of the Center, including a policy for terms and conditions of employment personnel. Policies of the center shall be consistent with State laws and regulations. Policies shall be filed with the Commissioner when adopted. Policy revisions shall be filed immediately. [Emphasis added.]
>
> (Respondent's Exceptions, at p. 18)

Respondent cites the pertinent section of the Board's policy affecting vacation balances (P-1) which states the following:

> Where an employee has earned vacation balance which has not been previously scheduled as of April 1, the supervisor will meet with the employee to determine a schedule of such vacation time so that no accrued vacation time will be lost. (Emphasis added)
>
> (Respondent's Exceptions, at pp. 12-13)

In view of the above, respondent continues by way of its exceptions to conclude the following:

> The clear inference of this EIC-NE rule is that vacation time would be lost unless a supervisor agreed to reschedule such vacation first. Dr. Lewis's supervising entity was clearly the

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accrued and carried-over vacation. It is suggested that such a claim could only be made to the Department. N.J. Civil Service Ass'n v. State, supra. In acting upon this request, the Department was obligated, in its capacity akin to a trustee of EIC-NE's assets, to determine whether indeed Dr. Lewis was entitled to such a payment. In so doing, the Department examined the records in its possession and determined that Dr. Lewis was not entitled to his request for vacation pay.

***

Hence, it is in this respect that the Department of Education strongly contests the ALJ's statement that:

> The Board creates the rules and policies, and in so doing may vary, change or amend those rules and policies at any time, so long as it is not illegal, fraudulent or in bad faith. (Initial Decision, ante)

It is submitted that this is clearly in error as fraud or bad faith are not the only grounds to vitiate an action by an agency. Although it is not contested that the Board during its valid life, could have altered its policies, such alterations needed to be "filed with the Commissioner when adopted," and "policy revisions ... [needed to] be filed immediately." N.J.A.C. 6:80-1.12. In the case sub judice this was never done by the EIC-NE Board. The Board at no time characterized its actions vis a vis Dr. Lewis as an alteration of existing rules and policies and at no time filed any policy revisions with either the Commissioner or the State Board. As such, the conclusion is unmistakable that no policy revision was enacted by the Board. Rather, the Board accommodated its executive director by simply doing as it pleased in disregard of the governing rules of the Center.

The determination to reject Petitioner's claim is thus a proper exercise by the Commissioner of Education in enforcing those laws and rules applicable to education in the State. See N.J.S.A. 18A:4-10, 18A:4-15, 18A:4-16 and particularly N.J.S.A. 18A:4-23 which states that the Commissioner "shall enforce all rules prescribed by the State Board." See also

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Piscataway Tp. Bd. of Ed. v. Burke, 158 N.J. Super. 436 at 440-441 (App. Div. 1978). This action by the Commissioner now deserves the presumption of correctness. Id. at 441.

It is thus suggested that the Department properly exercised its judgment in denying Dr. Lewis's claim. As the enforcer of education laws in New Jersey, the Commissioner is empowered to refuse to rubber stamp transactions violative of State-approved policies. As the Board did violate such policies, the Department's action was proper and Petitioner's request should be denied. (Respondent's Exceptions, at pp. 17-19)

POINT III

BECAUSE THE DEPARTMENT OF EDUCATION HAD PLACED ON MARCH 10, 1983 A FISCAL MONITOR AT EIC-NE TO CLOSE IT OUT, THE DETERMINATION BY THE BOARD ON APRIL 20, 1983 TO GRANT PETITIONER HIS REQUEST FOR VACATION PAY HAS NO BINDING VALUE AS IT WAS ONLY RECOMMENDATORY IN NATURE.
(Respondent's Exceptions, at p. 20)

Respondent argues that the language in the letter transmitted to the Commissioner on February 17, 1983, (J-3), clearly and unequivocally requested that the Commissioner assign a fiscal monitor to "supervise" the close-out of the Center's operations due to its critical fiscal deficit.

The Commissioner did, in fact, grant the Board's request and as of March 9, 1983 the Commissioner responded in writing (J-4) to the Executive Director indicating that Dr. John Casey was appointed to carry out the responsibility of fiscal monitor.

In this regard respondent argues that the Board, in light of its fiscal problems, voluntarily surrendered its powers of closing out the Center as of the date of the Commissioner's letter (J-4). Respondent points out that such action by the Commissioner in appointing a fiscal monitor to take full charge of the operations and activities of a local educational agency (L.E.A.) is clearly spelled out in the decision of the New Jersey Supreme Court. In the Matter of the Board of Education of the City of Trenton, Mercer County, 86 N.J. 327 (1981) Moreover, respondent maintains that the Commissioner may direct the fiscal monitor to act as a supervisor "who is to report directly to the Commissioner with respect to the total operation of the school district." In re Trenton, at 328

Respondent further maintains that, inasmuch as the Board of Directors never revoked its assent to the entrance of a fiscal monitor to "supervise" its close-out operations, his appointment by the Commissioner as of March 9, 1984 (J-4) represented the Commissioner's decision making authority over the close-out operations of the Center as of March 9, 1983 until its ultimate conclusion.

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According to respondent the record establishes that Dr. Casey, as fiscal monitor, did in fact "supervise" the close-out operations of the Center on April 20, 1983 when he made the following statement to the Board.

> ***I made it clear that the board had faced a deficit. I also made it clear to them that I would not incur additional expenses or adding to those expenses [IIT109:4-6] (emphasis added) .... I would have advised the Board at various times in the meeting, including the discussion about Dr. Lewis's [sic] vacation and the deficit position. [IIT110:22-24]***
>
> (Respondent's Exceptions, at p. 23)

This position taken by Dr. Casey was substantiated by the testimony of the Executive Director. (IIT45:23-25) Respondent also relies on the fact that the record reveals further decisive action taken by the fiscal monitor in opposing an attempt by some Board members to immediately write out a check to petitioner for vacation pay on April 20, 1983. (See Respondent's Exceptions, at pp. 23-24.)

Moreover, respondent asserts that the record of this matter clearly establishes that Dr. Casey in his role as fiscal monitor never paid petitioner pursuant to the Board's resolution of April 20, 1983. His decision in this matter was also upheld by the State's auditor at the close out of the Center's operation.

Consequently, for the reasons submitted above respondent urges the Commissioner to reverse the ALJ's finding which concludes that Dr. Casey was acting on behalf of the Commissioner solely in an "advisory" capacity to the Board.

The Commissioner has reviewed respondent's exceptions to the initial decision which appear unrefuted in the record by petitioner.

The Commissioner rejects in toto those findings and recommended conclusions set forth in the initial decision by the ALJ.

In reaching this determination, the Commissioner cannot agree in the first instance that he lacks the jurisdiction to render a determination with respect to his authority to review the provisions of the contract (J-1) in connection with policies (J-3) promulgated by the Board of Directors concerning accrued vacation time.

In this regard, the findings and conclusions which ignore the Commissioner's authority to rule upon the terms and conditions set forth in the provisions of petitioner's contract (J-1), in conjunction with the Board's policies affecting accrued vacation time, are in error. Moreover, it is noted from the footnotes on pages 4-7 of respondent's excerpts, which are documented in the transcripts of these proceedings, that certain of the ALJ's remarks

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during the hearings were highly inappropriate and prejudicial to respondent's defenses. In certain instances during trial testimony the unsolicited, highly opinionated remarks made by the ALJ may even be construed as to encourage witnesses' testimony. See IT 64:17-IT65:1; IT74:22-24; IIT26:17-24.

Under the provisions of N.J.S.A. 18A:6-100(h) (now repealed) the Commissioner's authority to review and approve those contracts entered by the EICs is unrefuted. The pertinent sections of the above-cited statute state that the Board of Directors has the power and duty to function as follows:

> ***With the approval of the commissioner, [to] appoint and fix compensation, terms and conditions of employment of an executive director in accordance with salary ranges and policies adopted by the State Board of Education and consistent with the State Compensation Plan ... N.J.S.A. 18A:6-100(h) (repealed). (Emphasis added)

Additionally, N.J.A.C. 6:80-1.12 (now repealed) also speaks to the Commissioner's authority to review the policies adopted by the Board of Directors governing the "terms and conditions of employment of personnel."

In the Commissioner's judgment the provisions of petitioner's contract (J-1) which terminated his employment due to the insufficiency of funds available to the Center on April 20, 1986, prevent him from laying claim to accrued vacation time notwithstanding the Board's resolution of that date to compensate him for 40 days' accrued vacation time. The Board's action in this regard was ultra vires inasmuch as his contract (J-1) is determined to be "null and void" or without force and effect as of April 20, 1983. This date is when the Board of Directors was officially notified by the fiscal monitor that it was confronted with a $120,000 deficit.

The Commissioner further finds that Point II of respondent's exceptions are well taken. Absent any amendment to its vacation policy (P-1) with the Commissioner's approval, the Board was without authority to grant petitioner's claim for accumulated vacation payment. Moreover it is clear that petitioner never at any time followed the directives of the Board's policy affecting the procedures to be used in requesting vacation carry-over time. Consequently, petitioner was not eligible to make such request for vacation compensation for prior years of employment service. Finally, the Commissioner finds and determines that petitioner by failing to comply with this specific Board policy (P-1) also failed to bear his burden of persuasion that he was entitled to the number of vacation carry-over days he has claimed (40 days). The number of days he has claimed is far in excess of those allowable under Board policy. Additionally, he has failed to present any other further proof other than his own testimony in support of his claim for accrued vacation days. The Board's action of April 20, 1983 must

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also be set aside for this reason inasmuch as it conflicted with its own vacation policy for employees including petitioner.

In conclusion the Commissioner cannot agree with the ALJ's finding that the Commissioner's fiscal monitor, Dr. Casey, merely acted in an advisory capacity to the Board of Directors.

The record of this matter unequivocally establishes that both the Commissioner and the Board had agreed that the fiscal monitor appointed by the Commissioner on March 9, 1983 (J-4) was to "supervise" the fiscal operations of the Center for the purpose of achieving an orderly close down of the Center's activities and operations.

Not only was Dr. Casey to oversee the operations but he was also charged with the responsibility of verifying all claims against the Board as well as those expenditures made by the Board. In this capacity Dr. Casey appropriately rejected the Board's attempts to compensate petitioner for accrued vacation days on April 20, 1983. All of the evidence contained in the record including the testimony of the Executive Director, Dr. Black, supports respondent's contention that the role of the fiscal monitor was not merely advisory in nature. This is especially so in view of the Board's apparent decision not to issue a check on its own behalf to petitioner as of April 20, 1983 without Dr. Casey's approval.

In light of all the foregoing reasons the Commissioner hereby reverses the initial decision.

Accordingly, it is ordered that the instant Petition of Appeal be dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3242-85
(EDU 6538-84 On Remand)
AGENCY DKT. NO. 135-4/84

LOIS GEILING-HURLEY,
Petitioner,
v.
EDISON TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

R. Joseph Ferenczi, Esq., Board Attorney, for respondent

Record Closed: January 21, 1986 Decided: February 25, 1986

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The original action in this case was for an order directing reinstatement of Lois Geiling-Hurley (petitioner) as a teacher, within the scope of her certifications in the Edison Township Public Schools. The matter was opened before the Commissioner of Education and was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. The matter proceeded on cross-motions for summary judgment. An initial decision under OAL DKT. EDU 6538-84 issued on April 8, 1985. The initial decision held that the Board should have appointed the petitioner to the position in contention provided there was no one on the preferred eligible list more senior than she.

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On May 24, 1985, a Commissioner of Education decision issued setting aside the conclusion that the petitioner was arbitrarily and capriciously denied the right to fill the controverted position. Nevertheless, while determining that the petitioner did not possess a seniority entitlement to the position, the commissioner also held that it remained to be determined whether the petitioner deserved the finding in her favor based "upon principles of equity." (Slip opinion at page 14.)

The Commissioner remanded the matter to the Office of Administrative Law for a limited finding of fact relative to the Board's action upon determining of its error (hiring a teacher who did not hold an English endorsement) and whether the person who presently holds the position also holds a subject matter endorsement in English.

Counsel attempted, over a period of time, to settle the matter or at least to stipulate all relevant facts so that the matter could proceed on the papers. In late summer I was notified that there were some legitimate questions of fact remaining and that a limited hearing would be required. The matter was heard on November 21, 1985, at the Edison Municipal Court. The record closed on January 21, 1986.

RELEVANT EVIDENCE

Certain facts are not in dispute and reveal the context of the case:

1. The petitioner was reduced in force by resolution of the Board, dated April 15, 1983.

2. The petitioner was advised in writing in January 1984 by the Board's personnel director of a vacant English teacher position at one of its junior high schools.

3. The petitioner applied for the position and requested an interview.

4. On or about January 26, 1984, the petitioner was advised that the Board had not selected her for the English teacher position and had decided that it would be "upgrading the position" by hiring a teacher with an English endorsement on her teaching certificate.

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5. On or about January 26, 1984, the petitioner was advised the Board had found an individual who, although not tenured, did possess an English endorsement on her teaching certificate and that the individual would be recommended for the position.

6. On or about February 13, 1984, the Board adopted a resolution employing this individual in the junior high school seventh grade English position.

7. At some time in April 1984, the petitioner discovered that the individual employed by the Board did not have an English endorsement on her teaching certificate, but possessed only elementary and reading endorsements.

The petitioner testified that she earned 28 credits in the field of English in her undergraduate work. She offered a transcript of her undergraduate work in support of this testimony (P-3).

The petitioner also stated she was originally hired to teach in the State Compensatory Education Program. In September 1977, she was hired to teach a self-contained fourth grade at Oaktree School. In 1978-79 she taught a third grade in the same school. In 1979-80 she taught a sixth grade at that school. In 1980-81, now under tenure, the petitioner taught sixth grade at Piscataway Town School. In 1981-82 she taught a fifth grade at that school. In her last year of employment, 1982-83, she taught a fifth grade at Washington School. All of these positions were half-time or .5 positions. The petitioner taught English, arts and mathematics. She also participated in professional days and in-service courses geared to English and mathematics teaching.

Following the reduction in force (RIF) in April 1983, the petitioner signed a paper stating her interest in positions in the sixth, seventh or eighth grades. The district was at that time creating a middle school comprised of those grades.

In January 1984, she was called by the director of Personnel. He inquired if she were interested in an English position in seventh grade. Petitioner replied that she was interested. The director arranged for an interview by the English department supervisor. In addition, the petitioner received written notices concerning the English

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teaching position (P-5, P-7, P-8). During the interview with the English department supervisor, the petitioner discussed the seventh grade curriculum. The supervisor explained that the duties would include teaching remedial seventh grade students. The petitioner pointed out what she had done in her prior assignments and how she believed that made her a candidate for this assignment, particularly in view of the fact that the pupils were operating on fifth and sixth grade levels.

The petitioner did discuss upgrading the position with the supervisor. The supervisor explained that because of changes going on within the middle school that was being formed, the Board had the option of hiring elementary teachers to fill the middle school positions and also had the option of assigning certified teachers from the secondary school to fill subject positions.

There was no discussion about upgrading the petitioner's certificate to include an English endorsement.

The petitioner recalled that she was the first name on the preferred eligible list at the time of the interview. She stated it was her belief that she was next in line to be hired from the elementary list. The petitioner also stated that she knew of at least three elementary persons who had been riffed in April 1983 and had been recalled or reemployed in the seventh and eighth grades.

The petitioner also stated that she did not accept employment in another school district after her final day of service in Edison in June 1983. She sent out five or six letters and resumes but was advised by each district that they were not hiring at that time.

The supervisor of English testified. She began her employment in that position in the 1983-84 school year. The witness testified that once the district knows there is going to be a vacancy, the supervisor reviews all available applications that are maintained in a file in the superintendent's office. If there are not sufficient applications or if the administration believes that the people whose applications are on file do not meet appropriate qualifications, the district may advertise to generate additional applications.

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In the present case, advertising was undertaken. Following that, the supervisor established appointments with those people she believed qualified. After the initial interviews, names of persons meeting the qualifications were forwarded to the building principal who continued the interview process and actually made a recommendation for hire to the superintendent.

In the present matter, the supervisor interviewed approximately eight persons including the petitioner. She recommended two persons to the principal. One was the person ultimately hired.

The building principal interviewed the two candidates recommended by the supervisor. He then recommended to the superintendent the hire of Susan Koyen. His notation to the superintendent reads:

> Interviewed well. Appears to be able to handle discipline, structure. Served as long-term substitute at Stevens. Highly recommended by Mr. Alley and Mr. Savad. I recommend employment February 6, 1984.

The supervisor testified that overall, she believed the two persons she sent to the building principal were better qualified than the petitioner.

The supervisor also testified that she was aware that Koyen was not certified as an English teacher but was certified as a reading specialist. The vacancy was for a position in which one class of remedial English, among others, would be taught.

This witness also stated that she had no recall of a telephone conversation with the petitioner stating that the position went to an English subject specialist. Neither could she recall that the petitioner had 28 undergraduate credits in English, drama and speech. In reviewing the petitioner's background, the supervisor did not count credits but would have been aware of the areas in which the petitioner had studied.

The supervisor stated that this was her first involvement in the interviewing process. Of the 100 teachers currently under her supervision, there now are two who have only elementary certifications. There are people who were previously certified in elementary education and had since become certified in English and, at the time she began as supervisor, were certified in English.

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The witness could not state at what particular times these persons had received English endorsements. She further stated she did not believe the petitioner was unqualified but merely believed that Koyen was more qualified. In the exclusion of other candidates who might have been better, the supervisor might have recommended the petitioner for the position.

This witness stated that at the end of the 1983-84 school year a further RIF was effected at the secondary level. The position for which the petitioner here contends was abolished. Another full-time position was abolished and two teaching staff members who had been employed full-time were reduced to part-time positions. Koyen no longer is teaching in the district. Her entire employment was for one-half year.

DISCUSSION AND DETERMINATION

In Kornett v. Sayreville Bd. of Ed., OAL DKT. EDU 7109-84 (Apr. 29, 1985), mod., Comm'r of Ed. (June 14, 1985), the Commissioner held that the right of an elementary endorsed teacher to teach or be assigned in any seventh or eighth grade departmentalized area in a particular subject assignment as endorsed has not been disturbed by the revised seniority regulations that became operative September 1, 1983. N.J.A.C. 6:3-1.10. The Commissioner also has held that eligibility for, and not actual possession of, a certificate is sufficient for promotional purposes. Kane v. Hoboken Bd. of Ed., 1975 S.L.D. 12.

The present case deals with a recall to service from a RIF, an action at least as important to the affected individual as a promotion.

The petitioner concededly was at the top of the preferred eligible elementary teacher list. The petitioner also appears to have been eligible for an English teacher endorsement at the time of her RIF and at the time of the possible recall. The record also shows that the person who was selected to fill the controverted vacancy did not hold an English endorsement nor was she tenured in the district.

The remand from the Commissioner of Education specifically requires this tribunal to determine whether the Board employed a subject matter endorsed person for the disputed English position and, if not, whether the petitioner is entitled to the position

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on principles of equity. Having reviewed the whole record and taking particular cognizance of the fact that the person selected for the controverted position was neither English-endorsed nor tenured, I **FIND** that the petitioner should have been preferred for the seventh grade English teaching position for the approximately one-half year between February 13 and June 30, 1984.

I further **FIND** it uncontested that the subject position was abolished, effective at the end of the 1983-84 school year.

Had the district, as was represented to the petitioner, hired a person into the contested position who possessed an English endorsement, there would be no dispute. However, it appears both that the district did make such a representation to the petitioner and that the district did not fill the position with an English-endorsed person. Thus, a non-tenured person was hired into a position for which the petitioner was qualifed at a time when the petitioner was on a preferred eligible list pursuant to N.J.S.A. 18A:28-12.

In addition, the record is devoid of any evidence that the Board adopted a resolution to reorganize instruction in grades seven and eight pursuant to N.J.A.C. 6:3-1.10(l)16i. While this fact, in and of itself, may not support the above finding as to the petitioner's preferability, it does lend some support to it. In sum, the equities lie on the petitioner' side.

In consideration of the foregoing and after a thorough review of the record, I **CONCLUDE** that the petitioner should have been hired into the seventh grade English position for the period February 13 - June 30, 1984. Accordingly, it is **ORDERED** that the petitioner be paid for that period at the rate she would have received under the then-applicable teacher salary schedule. Because the petitioner apparently made good faith efforts to secure alternative employment but was unsuccessful, the back pay shall not be subject to mitigation.[1]

---

[1] Vexler v. Red Bank Borough Bd. of Ed., 1 N.J.A.R. 196.

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It is further **ORDERED** that the Board make proper adjustments with the Teacher's Pension Annuity Fund concerning the petitioner's account.

I further **CONCLUDE** that because the subject position apparently was abolished in good faith at the end of the 1983-84 school year, there is no further relief to which the petitioner is entitled. Therefore, the balance of the appeal is **DISMISSED**. It is so **ORDERED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

25 FEBRUARY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

FEB [illegible]
DATE

[illegible]
DEPARTMENT OF EDUCATION

Mailed To Parties:

FEB 27 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ij/ee

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WITNESS LIST

Lois Geiling-Hurley

Ann Lawrence

EXHIBITS LIST

P-1	Teacher's certificate, Lois M. Geiling, February 2, 1967
P-2a through P-2yy	Evaluations and observations of Lois Geiling-Hurley
P-3	College transcript, East Stroudsburg State College, Lois J. Geiling, January 26, 1967
P-4a through P-4h	Correspondence between Board and petitioner concerning assignments and salaries
P-5	Memorandum, Bradshaw to All Riffed Elementary Teachers with Less than Full-Time Employment for 1983-84, August 24, 1983
P-6	Letter, Bradshaw to To Whom It May Concern, December 6, 1983
P-7	Memorandum, Bradshaw to Geiling-Hurley, January 6, 1984
P-8	Notice of available position, December 20, 1983
R-1	Affidavit of Charles A. Boyle, July 31, 1985
R-2a	Professional employment application of Susan Koyen, January 12, 1984
R-2b	Curriculum vitae, Susan Koyen
R-2c	Letter, Webster to To Whom It May Concern, August 21, 1981
R-2d	Letter, Hallanan to To Whom It May Concern, August 21, 1981
R-2e	Classroom observation report, Koyen as substitute, May 3, 1982

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LOIS GEILING-HURLEY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and recommended decision rendered by the Office of Administrative Law have been reviewed. Exceptions which were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4 a, b, and c are summarized below.

The Board asserts that there is confusion on the part of the ALJ as to whether or not the disputed position required an English endorsement and argues that the position did not require such endorsement. It contends it is uncontroverted that in the opinion of the English Supervisor, Mrs. Lawrence, petitioner was not the best qualified for the position available in 7th grade. Of this the Board states, "She did not possess an English certificate and she had no experience teaching departmentalized instruction at that level. On the other hand, Susan Koyen, the successful applicant, was certified as a K-12 reading specialist and had substitute experience in the Edison school system.***" (Board's Exceptions, at pp. 4-5)

Further, the Board contends that the ALJ's nonacceptance of the fact that its organization for grades 7 and 8 is secondary (Initial Decision, ante) is reversible error. It also asserts that findings nos. 4 and 5 in the initial decision, ante, are completely unsupported by the evidence in the matter and reflect the ALJ's confusion about an English certificate being required. These findings read:

> 4. On or about January 26, 1984, the petitioner was advised that the Board had not selected her for the English teacher position and had decided that it would be "upgrading the position" by hiring a teacher with an English endorsement on her teaching certificate.
>
> 5. On or about January 26, 1984, the petitioner was advised the Board had found an individual who, although not tenured, did possess an English endorsement on her teaching certificate and that the individual would be recommended for the position.

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The Commissioner notes that these very same statements constitute findings Nos. 4 and 5 of the initial decision of April 8, 1985 in this matter. The Board in its exceptions to that decision stated: "Respondent does not question the [ALJ's] findings of fact 1 through 8, respectively, as they appear at pages 7 and 8." (emphasis supplied) Therefore, the Commissioner is unpersuaded that the recitation of these two findings in this decision on remand constitute "reversible error." Moreover, it must be stressed that this matter was remanded for the sole, limited purpose of determining if the individual hired for the disputed position holds a subject matter endorsement in English. (Commissioner's Decision of May 24, 1985, at p. 15)

Petitioner urges affirmance of the initial decision because (1) she believes the Board's argument erroneous that an English endorsement was not required; (2) if one were required, she was entitled to the position in that she had met all of the requirements for said endorsement; and (3) since she was subject to a reduction in force in April 1983, she was entitled to the position. In support of the latter point, petitioner cites the recent Appellate Division decisions in Hill v. Board of Education of West Orange, Docket No. A-4355-84T1, February 19, 1986 and Edison Township Education Association v. Edison Township Board of Education, decided by the Commissioner June 18, 1984, aff'd State Board December 5, 1984, aff'd New Jersey Superior Court, Appellate Division, Docket No. A-2030-84T7, February 11, 1986 which she contends affirmed the right of a teacher with an elementary endorsement who was riffed prior to September 1, 1983 to claim a position in Edison's seventh and eighth grades.

There is no question that petitioner's seniority rights vested under the prior regulations. Hill, supra; Edison Township, supra However, there still appears to be some confusion on petitioner's part as to what entitlement this brings to bear. As previously stated in the Commissioner's decision dated May 24, 1985, petitioner has no seniority entitlement to the disputed position because her seniority is strictly limited to the elementary category whereas the disputed position rests in the secondary category. N.J.A.C. 6:3-1.10(1)(15)

Contrary to petitioner's argument, Edison Township, supra, does not stand for the proposition that a teacher with an elementary endorsement and no service in departmentalized grades 7 and 8 who was riffed prior to September 1, 1983 is entitled by virtue of seniority to claim a departmentalized seventh grade position falling within the secondary category. Edison, supra specifically expresses that for vacant positions known to the Board on or after September 1, 1983, the current regulations apply. Of this, it states:

> ***Accordingly, on or after September 1, 1983, no teacher whose seniority was in the elementary category who was not then currently assigned *** to teach grades 7 and 8 and who had not

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> previously taught in grades 7 or 8 would be entitled to claim an assignment in grades 7 or 8 by virtue of seniority.*** (emphasis supplied)
> (Slip Opinion, at p. 6)

See Old Bridge Education Association et al. v. Board of Education of Old Bridge, decided by the Commissioner August 8, 1985 and In re Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Board of Education and Edison Board of Education, decided by the Commissioner August 6, 1984, aff'd State Board January 2, 1985. Eligibility for an English endorsement in no way alters this determination even if the Board did require such an endorsement. Thus, Kane, supra, alluded to by the ALJ is inapposite to this matter.

As correctly stated by the ALJ, Kornett, supra, stands for the proposition that the seniority regulations operative September 1, 1983 have not altered the right of an elementary endorsed teacher to teach or be assigned in a departmentalized area. Boards may, if they so desire, require either an elementary or a subject matter endorsement for such positions. However, this does not translate into a seniority entitlement to such position if one's service was exclusively in the elementary category as herein. As correctly pointed out by the ALJ, had the Board acted to require a subject field endorsement and filled the disputed position with a teacher so endorsed, the Board's action would be affirmed. However, such is not the case in the instant matter. The Board acted to fill the position with an elementary endorsed teacher. The fact that the individual was endorsed as a reading teacher is of no moment in that she could fill the vacant English position only by virtue of the elementary endorsement, not the reading endorsement.

In the Commissioner's judgment, once the Edison Board acted to fill the disputed position with an elementary endorsed teacher as opposed to a subject matter endorsed English teacher, it could not, on the basis of equitable estoppel, offer the position to an elementary endorsed teacher not on its preferred eligibility list when elementary endorsed teachers who were subject to a RIF remained on such a list.

To determine otherwise would fly in the face of the spirit and intent of statutes with respect to tenure and seniority since the position was one which, by the Board's action herein, petitioner was qualified to teach by virtue of her elementary endorsement.

Accordingly, the Commissioner adopts the recommended decision on remand as clarified herein. The Board is ORDERED to comply forthwith with the directives of the Office of Administrative Law contained therein.

COMMISSIONER OF EDUCATION

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LOIS GEILING-HURLEY,

PETITIONER-RESPONDENT,

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, : DECISION

RESPONDENT-APPELLANT.

Remanded by the Commissioner of Education, May 23, 1985

Decided by the Commissioner of Education, April 14, 1986

For the Petitioner-Respondent, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, R. Joseph Ferenczi, Esq.

Petitioner in this case is a tenured elementary school teacher with K-8 certification, whose position was abolished in April 1983. In January 1984, she was advised of a vacancy at one of the District's junior high schools and applied for the position. She, however, was not selected for the position. Although Petitioner was advised that the reason she had not been selected was that the Board would be filling the vacancy with a teacher who possessed an english endorsement, Petitioner later discovered that the individual hired by the Board, who was not a tenured teacher, possessed only elementary and reading endorsements. Petitioner then filed a Petition of Appeal to the Commissioner, asserting that she was entitled by her seniority to the position.

In his decision of May 25, 1985, the Commissioner determined that, although qualified to fill the position, Petitioner had no seniority entitlement to it since she had no seniority in the secondary category, which was the category applicable to the position. Lois Geiling-Hurley v. Board of Education of the Township of Edison, decided by the Commissioner, May 24, 1985. He, however, remanded the case for a determination of whether Petitioner deserved "...a finding in her favor based upon principles of equity." Id. at 14.

Pursuant to the remand, the Administrative Law Judge (ALJ) determined that although the District had represented to Petitioner that it had filled the position with a teacher who possessed an english endorsement, the individual it hired did not possess such endorsement. Thus, a non-tenured teacher was hired in a position for which Petitioner was qualified when Petitioner was on a preferred eligibility list pursuant to N.J.S.A. 18A:28-12. The ALJ

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therefore directed that Petitioner receive full compensation from February 13 through June 30, 1984, when the position in question was abolished.

The Commissioner adopted the findings and determinations of the ALJ. He, however, clarified that determination, emphasizing that although Petitioner had no seniority entitlement to the position "...once the Edison Board acted to fill the disputed position with an elementary endorsed teacher..., it could not, on the basis of equitable estoppel, offer the position to an elementary endorsed teacher not on its preferred eligibility list when elementary endorsed teachers who were subject to a RIF remained on such a list." Commissioner's Decision, at 14.

We affirm that Petitioner had no seniority entitlement to the position at issue in this case since, under the regulations in effect at the time the vacancy occurred, she had no seniority in the category applicable to the position. Edison Township Education Association v. Edison Township Board of Education, decided by the Commissioner, June 18, 1984, aff'd by the State Board, December 5, 1984, aff'd, Docket #A-2030-84T7 (Feb. 11, 1986). However, we reverse the Commissioner's determination that equitable estoppel precluded the Board from hiring an elementary endorsed teacher not on the preferred eligibility list to fill the vacancy.

The doctrine of equitable estoppel precludes a party from asserting rights that might otherwise have existed as against another person who has in good faith relied upon the conduct of the party asserting the right, and who has been led thereby to change his position for the worse. Highway Trailer Co. v. Donna Motor Lines, Inc., 46 N.J. 442, cert. denied, Mount Vernon Fire Ins. Co. v. Highway Trailer Co., 385 U.S. 834 (1966). The essential principal of the doctrine is that one may be precluded by his voluntary conduct from taking a course of action that would work injustice to another who relies on his conduct with good reason and in good faith. Summer Cottager's Ass'n of Cape May v. City of Cape May, 19 N.J. 492 (1955). An essential element of equitable estoppel is a change in position by a person who, with good reason, relies upon the word or conduct of another to his detriment. Rossum v. Jones, 97 N.J. Super. 382 (App. Div. 1967).

In the instant case, although Petitioner was advised that the Board had decided to require a subject matter endorsement for the position, the record does not show that the Board represented to Petitioner that she would be hired to fill the vacancy if the Board determined to require only an elementary endorsement. See Initial Decision at 2-3. Furthermore, there is no indication that Petitioner placed any reliance on any representations made to her during or subsequent to her interview. Although Petitioner did not accept employment with another district after her position was abolished in June 1983, she did seek employment and there is no indication that she abandoned such efforts as a result of the possibility of selection by the Board for the position at issue here. See Initial Decision, at 4. Nor would she have been justified in abandoning her efforts or refusing an offer of

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employment based on the course of events established in the record. We therefore conclude that the elements warranting the application of the doctrine of equitable estoppel are not present in this case and that any entitlement Petitioner may have had to the position is governed by N.J.S.A. 18A:28-12.

N.J.S.A. 18A:28-12 provides that a teaching staff member who is dismissed as the result of a reduction in force

> ...shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs and in determining seniority, and in computing length of service for reemployment, full recognition shall be given to previous years of service...

Thus, although the protections afforded by N.J.S.A. 18A:28-5 to tenured teaching staff members terminate following proper dismissal pursuant to N.J.S.A. 18A:28-9, N.J.S.A.18A:28-12 confers on tenured teachers whose employment has been terminated as the result of a reduction in force, the right to placement on a preferred eligibility list based on his seniority, and to reemployment when a vacancy occurs.

We emphasize that the maximum right of such teacher with respect to reemployment is substantively fixed by N.J.S.A. 18A:28-12 and is procedurally controlled by the applicable regulations. Maywood Bd. of Ed. v. Maywood Ed. Ass'n., 168 N.J. Super. 45 (App. Div. 1979).[1] The substantive right conferred by the N.J.S.A. 18A:28-12 is to reemployment in a vacancy when an individual is both qualified to fill the vacancy by virtue of his certification and is entitled to the position by virtue of his seniority. cf. Lichtman v. Board of Educ. of Village of Ridgewood, 96 N.J. 93 (1983). We, however, reiterate, that determinations made concerning the seniority of teaching staff members are governed by the regulations in effect at the time the vacancy occurs. Edison, supra.

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[1] In her exceptions to the Legal Committee's Report in this matter, Petitioner, relying on our recent decision in Capodilupo v. Board of Education of the Town of West Orange, decided by the State Board, September 3, 1986, argues that she is entitled to reemployment in the vacancy at issue here by virtue of her tenure status. We do not agree. In Capodilupo, we emphasized that the principles enunciated in that decision are applicable only when a district board acts under the authority granted by N.J.S.A. 18A:28-9. Capodilupo, supra, at 20. N.J.S.A. 18A:28-9 is not implicated when, as here, a board fills a vacancy six months after the reduction in force that resulted in the termination of a tenured teacher's employment, and, therefore, Capodilupo is not applicable to this case.

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Here, Petitioner was qualified to fill the vacancy in question by virtue of her certification. However, although first on the preferred eligibility list for the elementary category, she, as the Commissioner found in his original decision in this matter, had no seniority in the secondary category, which was the category applicable to the position. Hence, she had no entitlement toreemployment pursuant to N.J.S.A. 18A:28-12. Again, N.J.S.A. 18A:28-12 establishes Petitioner's maximum right to reemployment. Maywood, supra. Thus, although the Board properly could consider employing her for the position, the education laws did not obligate the Board to hire Petitioner to fill the position at issue in this case. cf. Whalen v. Board of Educ. of Boro. of Sayerville, 192 N.J. Super. 453 (1983), certif. denied, 96 N.J. 312.

For the reasons set forth above, we reverse the decision of the Commissioner.

Attorney exceptions are noted.
November 5, 1986

Affirmed N.J. Superior Court October 5, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5299-85
AGENCY DKT. NO. 276-8/85

CAROL BOCKER, JUDITH BRADLEY, NAOMI HOCHMAN, BEATRICE RITTENBERG AND DEBORAH SOLOMON,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,
Respondent.

Gregory T. Syrek, Esq., for petitioners (Bucceri & Pincus, attorneys)

Rodney T. Hara, Esq., for respondent (Fogarty & Hara, attorneys)

Record Closed: February 18, 1986 Decided: February 27, 1986

BEFORE **TIMOTHY N. TUTTLE**, ALJ:

This matter was brought as the result of a petition filed pursuant to N.J.S.A. 18A:6-9, which vests the Commissioner of Education with jurisdiction to hear and determine all controversies and disputes arising under the school laws. On August 21, 1985, the case was transmitted to the Office of Administrative Law for determination as a contested matter pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on October 7, 1985. A Prehearing Order was issued on October 8, 1985 which delineated the legal issues to be determined as follows:.

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(1) Whether petitioners are entitled to credit for their years of service as part-time remedial teachers when they are placed on the teachers' salary guide.

(2) Whether petitioners' claim for salary guide placement credit for their years of service as part-time remedial teachers is barred by the equitable doctrine of laches.

(3) Whether petitioners' claim for salary guide placement credit for their years of service as part-time remedial teachers should be dismissed with prejudice for failure to file their petitions within 90 days from the date they were initially placed on the teachers' salary guide. N.J.A.C. 6:24-1.2.

(4) Whether the Board properly froze two teachers' salaries when it had mistakenly granted salary guide credit to the teachers the previous year.

(5) Whether petitioners are entitled to interest if they are successful where the Board had acted in good faith and the law was in a state of uncertainty on the issue.

The record was closed on the receipt of the petitioners' and respondent's rebuttal on February 18, 1986, and the matter is now ripe for decision based on the pleadings, evidentiary documents, briefs and stipulated facts.

Based upon the parties' joint stipulation of facts, I **FIND** the following:

1. Petitioners, Carol Bocker, Beatrice Rittenberg, Deborah Solomon, Judith Bradley and Naomi Hochman are tenured full-time teaching staff members in respondent's employ.

2. Petitioners Bocker, Rittenberg, Solomon, Bradley and Hochman are employed by the respondent for the 1985-86 school year.

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3. In determining the salary guide placement of Bocker, Rittenberg and Solomon for the 1985-86 school year, respondent has failed and refused to include any credit for petitioners' years of service as remedial teachers in Wayne. Respondent has given credit for petitioners' teaching experience outside of Wayne and for classroom teaching experience in Wayne.

4. On January 30, 1985, respondent adjusted the 1984-85 salary guide placement of Bradley and Hochman to include their prior service as remedial teachers in the Wayne school district.

5. By letter dated May 30, 1985, Bradley and Hochman were notified that the respondent had decided to freeze their salaries at the salaries they received during the 1984-85 school year. They will not receive any salary increases "until such time as the original salary sequence for which [they] were originally employed is surpassed" because the Board believes it erroneously adjusted their salaries in accordance with paragraph four of the stipulation of facts.

6. At no time did the respondent act to withhold the salary and/or adjustment increments of Bradley or Hochman pursuant to N.J.S.A. 18A:29-14.

7. During the 1984-85 school year, petitioners received the following salaries for their employment with the respondent:

(a)	Bocker	MA, Step 6 $17,485
(b)	Bradley	BA, Step 8 $17,358
		Adjustment retroactive to 9/1/84
		BA, Step 16-20 $25,956
(c)	Hochman	MA+30, Step 16-20 $33,052
		Adjustment retroactive to 9/1/84
		MA+30, Step 21 $35,166

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(d)	Rittenberg	BA+15, Step 11 $20,679
(e)	Solomon	BA, Step 13 $21,573

8. For the 1985-86 school year, petitioners are receiving the following salaries for their employment with the respondent:

(a)	Bocker	MA+15, Step 2 $21,998 (formerly Step 3-6)
(b)	Bradley	BA, Step 10 $25,956 (formerly Step 16-20)
(c)	Hochman	MA+30, Step 11 $35,728 (formerly Step 16)
(d)	Rittenberg	BA+15, Step 6 $22,333 (formerly Step 11)
(e)	Solomon	BA, Step 8 $23,299* (Formerly Step 13)

*Prorated 9.5 months $22,134

The 1985-86 salary guide was condensed from a 21 step to a 14 step guide. For purpose of placing teachers on the new guide, the steps were frozen when the salary guide was restructured.

9. The collective bargaining agreement covering classroom teachers in the school district is silent as to the subject of salary guide credit for experience as remedial teachers.

10. Copies of the following documents are attached hereto:

(a) Minutes, Public Work Session, dated May 23, 1985 (J-1);

(b) Board Policy No. 4141 (J-2);

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(c) Employee Record Cards:
Carol Bocker (J-3)
Judith Bradley (J-4)
Naomi Hochman (J-5)
Beatrice Rittenberg (J-6)
Deborah Solomon (J-7);

(d) Documents regarding Bocker:
Letter, dated April 30, 1984 (J-8)
Letter, dated April 30, 1985 (J-9)
Letter, dated April 30, 1985
from Bocker to Byrne (J-10)
Letter, dated May 14, 1985 (J-11)
Letter, dated May 30, 1985 (J-12);

(e) Documents regarding Bradley:
Employment contract, dated April 30, 1984 (J-13)
Letter, dated April 30, 1985 (J-14)
Letter, dated November 14, 1984 (J-15)
Letter, dated May 30, 1985 (J-16);

(f) Documents regarding Hochman:
Letter, dated April 30, 1985 (J-17)
Letter, dated May 18, 1984 (J-18)
Letter, dated January 25, 1985 (J-19)
Letter, dated January 30, 1985 (J-20)
Letter, dated May 30, 1985 (J-21);

(g) Documents regarding Rittenberg:
Letter, dated April 30, 1984 (J-22)
Letter, dated April 30, 1985 (J-23)
Letter, dated March 21, 1985 (J-24)

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Letter, dated May 14, 1985 (J-25)
Letter, dated May 30, 1985 (J-26);

(h) Documents regarding Solomon:
Employment contract, dated April 30, 1984 (J-27)
Employment contract, dated September 11, 1985 (J-28)
Letter, dated March 21, 1985 (J-29)
Letter, dated May 14, 1985 (J-30)
Letter, dated May 30, 1985 (J-31);

(i) 1984 and 1985-86 salary guides (J-32).

11. Petitioners were initially placed on the salary guide based on their years of classroom teaching experience in the Wayne School District and/or outside the school district, and educational qualifications as follows:

Bocker	1980-81, MA, Step 2
Bradley	1981-82, BA, Step 5
Hochman	1973-74, MA+15, Step 5
Rittenberg	1976-77, BA, Step 3
Solomon	1976-77, BA, Step 5

12. The following additional documents are attached hereto:
(a) Employee Record Card - Judy Frost (J-33);
(b) Employee Record Card - Cecile Ross (J-34);
(c) Employee Record Card - Susan Dector (J-35).

13. The petitioners' verified petition was filed with the Commissioner of Education on August 13, 1985.

The respondent, Wayne Board of Education, initially argues that the petitioners' petition should be dismissed inter alia as untimely relying upon N.J.A.C. 6:24-1.2 which provides as follows:

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> To initiate a proceeding before the commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested.

New Jersey courts have established that the accrual of a cause of action commences on the date on which the right to institute and maintain a suit first arose, upon knowledge of the injury, or in this specific set of circumstances the time when each petitioner was first notified or had knowledge of her placement on the professional salary guide and was given appropriate placement for prior remedial/supplemental experience. See, Rosenau v. City of New Brunswick and Worthington Gamon Meter Co., 51 N.J. 130, 137 (1968); Burd v. New Jersey Telephone Co., 149 N.J. Super. 20, 30 (App.Div. 1977) aff'd, 76 N.J. 284 (1978).

It is clear that a petition challenging placement on a professional salary guide is subject to the 90-day bar. See, North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984); Stockton v. Board of Education of Trenton, ____S.L.D.____ (State Bd. of Ed., April 3, 1985) and Baker v. Board of Education of Clifton. ____S.L.D.____ (Commissioner's Decision, October 18, 1985).

In North Plainfield Education Association v. Board of Education of North Plainfield, the New Jersey Supreme Court specifically rejected the petitioners' claims that improper salary guide placement is a continuing violation entitling them to raise that issue every year.

The Commissioner of Education, the State Board of Education and the courts have been taking a firm position in regard to petitioners' failures to comply with N.J.A.C. 6:24-1.2. The New Jersey Supreme Court has ruled that a teacher must file a petition

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within 90 days of his or her receipt of notice of a board's decision which affects him (such as withholding of an increment), and that a teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement. Board of Education Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 326-327 (1979). In accord, Riely v. Hunterdon Central High Board of Education, 173 N.J. Super. 109 (App.Div. 1980), wherein Riely's petition of appeal was out of time because she had utilized arbitration machinery and waited more than a year from the date of the Board's action before filing her petition with the Commissioner. See also, Miller v. Morris School District, ____S.L.D.____ (Commissioner's Decision, February 25, 1980), where the Commissioner held that the petition would be dismissed as untimely because that petitioner failed to file her petition until nine months after she was notified she would not be reemployed as a nontenured teacher. In accord, Rock v. Sayreville Board of Education, ____S.L.D.____ (State Bd. of Ed., October 5, 1983); Weir v. Northern Valley Regional H.S. District Board of Education, ____S.L.D.____ (July 20, 1985); aff'd. State Board (March 6, 1985).

However, before dismissing the petition I must consider whether the provisions of N.J.A.C. 6:24-1.19 should be applied because strict adherence to the 90-day rule in this case might be inappropriate, unnecessary or result in injustice. The Commissioner and the State Board have determined in recent decisions that the relaxation rule is to be applied sparingly. See, Kallimanis v. Board of Education Carlstadt-East Rutherford Regional High School District, ____S.L.D.____ (Commissioner's Decision September 26, 1980). Weir v. North Valley Regional H.S. District Board of Education.

In the instant case, I am not persuaded by petitioners' arguments in their brief or a review of the circumstances of this case that the 90-day bar should not be applied. No equitable grounds or meritous factual explanations have been raised which would mandate the inapplicability of N.J.A.C. 6:24-1.2.

Petitioner Bocker waited five years before she filed her petition; Bradley, four years; Hockman, 12 years; Rutenberg, nine years; and Solomon, nine years. If the petitioners felt aggrieved by their placement by the Wayne Board of Education on the professional salary guide and the appropriateness of the credit they received for prior

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remedial/supplemental teaching experience, they should have filed their petitions within 90 days of the date they had knowledge or notice of their placement on the professional salary guide.

Consequently, I hold that N.J.A.C. 6:24-1.2 bars the relief sought by the petitioners in Count One of the petition.

In the present case, two petitioners, Bradley and Hochman, further contend that the Wayne Board of Education acted improperly on May 23, 1985 in freezing their salaries until such time as the salary sequence for which they were originally employed is surpassed. The respondent Board of Education contends that its action on January 30, 1985 in retroactively granting salary guide credit to petitioners for years of experience as remedial teachers was legally mistaken and based upon an erroneous reading and understanding of Hyman v. Teaneck Board of Education, ____S.L.D.____, (August 15, 1983). Inasmuch as the petitioners' petition was timely filed on August 13, 1985 within 90 days of the Board of Education's action on May 23, 1985, I will address their specific claims for relief.

There have been two lines of school law decisions dealing with the issue of whether boards can recover money paid by mistake. These cases distinguish money paid under mistake of law, see, e.g., Stiles v. Bd. of Ed. of the Borough of Ringwood, 1974 S.L.D. 1170 (Comm. Ed. December 3, 1974), and money paid under mistake of fact, see, e.g., Anson, et al. v. Bd. of Ed. of the City of Bridgeton, 1972 S.L.D. 638 (Comm. Ed. December 5, 1972); Galop v. Bd. of Ed. of the Township of Hanover, 1975 S.L.D. 358 (Comm. Ed. May 16, 1975); Honaker v. Hillsdale Bd. of Ed., 1980 S.L.D. 898 (Comm. Ed. June 19, 1980); and Petigrow v. N. Warren Reg'l. H.S. Dist. Bd. of Ed., ____S.L.D.____ (Comm. Ed. April 24, 1980); Tripp v. Bd. of Ed. So. Orange-Maplewood, ____S.L.D.____ (Comm. Ed. February 6, 1984); Rivers v. Bd. of Ed. of Mercer Cty. Area Vo-Tech., ____S.L.D.____ (Comm. Ed. January 17, 1984); Caprio, et al. v. Bd. of Ed. of Tp. of Woodbridge, ____S.L.D.____ (Comm. Ed. August 13, 1984); Conti and Cutler v.

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Montgomery Bd. of Ed., ___S.L.D.___ (Comm. Ed., June 10, 1985); and Bree v. Bd. of Ed. of Tp. of Boonton, ___S.L.D.___ (Comm. Ed., August 6, 1984), rev'd. on other grounds, State board, decided February 6, 1985. Where money is paid under a mistake of law, boards may act to remedy that mistake. Where the error occurs because they were unacquainted with or unaware of facts, they may not.

In the present case, respondent's advancement of petitioners Bradley and Hochman on the salary guide on January 30, 1985 was given under a mistake of law. A mistake of law occurs when a person is fully acquainted with the existence of facts but is ignorant of or comes to an erroneous conclusion concerning their legal effect. Flammia v. Maller, 66 N.J. Super. 440, 459 (App.Div. 1961); Passaic Bd. of Ed. v. Bd. of Ed. of Wayne, 120 N.J. Super. 155, 164 (Law Div. 1972). And, though the Board advanced petitioners on the teachers' salary guide knowing that such credit was for their years of service as remedial/supplemental teachers, such credit certainly would not have been given had the Board realized it was not legally compelled to do so.

Consequently, I **CONCLUDE** that the Wayne Board of Education acted properly when it moved on May 23, 1985 to correct its prior mistake by holding petitioners at the same step of the guide which they had previously attained by virtue of their initial placements on the teachers' salary guide.

Inasmuch as I have determined that the petitioners' claims for relief should be dismissed for the above-stated reasons, I see no compelling reasons to address the remaining legal arguments raised by the petitioners and respondent.

Accordingly, based upon the foregoing, I **ORDER** that the petition should be and it is hereby **DISMISSED**.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

2·27·86
DATE

TIMOTHY N. TUTTLE, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 4 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

tw/e

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CAROL BOCKER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision of the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioners except to the ALJ's determination that Count I of the Petition of Appeal is time barred pursuant to N.J.A.C. 6:24-1.2. The Commissioner notes that this issue of salary guide credit for remedial/supplemental teaching experience has been dealt with in numerous decisions wherein the 90-day time bar was applied. Baker, supra; Shulman v. Bd. of Ed. of Morris School District, decided by the Commissioner April 15, 1985; Reilly v. Bd. of Ed. of Kearny, decided by Commissioner April 25, 1985; Verschuren v. Bd. of Ed. of Union County Regional High School District No. 1, decided by the Commissioner July 8, 1985; Conner et al. v. Bd. of Ed. of River Vale, decided by the Commissioner February 18, 1986; Bertisch et al. v. Bd. of Ed. of Bergenfield v. Bergenfield Education Assoc., decided by the Commissioner April 10, 1986.

The recommended decision of the ALJ dismissing Count I of the Petition of Appeal on the basis of failure to comply with the 90-day requirement of N.J.A.C. 6:24-1.2 is consistent with these decisions and those cited by the ALJ. Consequently, the initial decision with respect to Count I is adopted by the Commissioner.

Petitioners also except to the ALJ's determination that Count II be dismissed, arguing, inter alia, that on numerous occasions, the Commissioner has held that a board is bound by its salary determinations and that such determinations create rights upon which an employee may rely which cannot be rescinded by it at a later date. They cite at length Docherty v. Bd. of Ed. of W. Paterson, 1967 S.L.D. 297 and Anson, supra, in support of this contention, asserting that there are distinguishable circumstances between the instant matter and those in which a board's correction of an "error" with respect to salary placement was upheld. They contend that where correction was upheld, the individuals were being paid on the basis of work experience or educational background they did not actually have. Galop, supra; Stiles, supra; Shriver, supra; and Honaker, supra

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Petitioners avow that:

> Despite these clear decisions regarding the correction of mistakes, the initial decision accepts, without more, the Board's assertion that it would not have granted [remedial experience] credit had it "realized it was not legally compelled to do so." However, the Board did exercise its discretionary authority to grant guide credit for service actually performed. This action resulted in the creation of vested rights for the petitioners. These rights may not be removed on the sole basis of a claim that a "mistake" was made.***
>
> (Petitioners' Exceptions, at p. 6)

Further, petitioners argue that the Board's position is contrary to the very idea of "mistake of law," avowing that at the time the salary guide credit was granted, the Commissioner's decision in Hyman, supra, was still valid law and the Board admittedly relied upon this decision in granting credit for remedial experience. Of this they state:

> ***Thus, at the time the decision was made by respondent, it did not make a "mistake" in its legal conclusion. To the contrary, its determination was fully consistent with existing law. The Board is actually arguing that it has the right to alter salary decisions because of future legal determinations and conclusions*** This unconscionable attempt to reserve the unfettered right to alter salaries in the future must be rejected. No mistake of law exists because giving credit is not illegal.
>
> (emphasis in text)(Id., at pp. 6-7)

The Board urges adoption of the ALJ's recommended decision relying primarily on the arguments contained in the briefs previously submitted to the record. It does raise additional arguments in opposition to petitioners' position on the salary credit issue which are incorporated herein by reference.

Upon review of the record in this matter and the arguments raised by the parties, the Commissioner rejects the recommended decision of the Office of Administrative Law with respect to Count II, salary guide credit, for the following reasons.

The Commissioner cannot agree with the ALJ's determination that a "mistake of law" occurred in the case herein. In January 1985 Petitioners Hochman and Bradley were granted salary guide credit for their prior years of supplemental/remedial instruction in the Wayne School District. This action was entirely within the discretionary power of the Board to do. N.J.S.A. 18A:29-13 states that:

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> Boards of education shall have the power to increase for any member or classification of members included in any schedule, the initial salary or the amount of any increment or the number of increments. (emphasis supplied)

The record establishes that Petitioners Hochman and Bradley were granted salary credit in January 1985 based on the Hyman, supra, decision in effect at that time. It is further established that in May 1985, subsequent to the State Board's reversal of the Hyman decision, the Board acted to rescind the prior action granting the salary credit to them and it deferred any further action with respect to the other petitioners pending the appeal of Hyman to the Superior Court. The Board minutes of May 23, 1985 read in pertinent part:

> Mr. Fogarty, attorney, addressed the claim by several - now full time classroom teachers - who had prior supplemental experience in the school district, to advancement on the salary guide according to the number of years they spent performing supplemental instruction. He stated that a request had been made back in December, 1984 by Mr. Argentero [Pupil Personnel Director] to provide a legal opinion concerning the entitlement of teachers of supplemental instruction to advancement on the salary guide to the number of years equivalent to their experience.
>
> Mr. Fogarty quoted the state of the law on this. He quoted the Hyman Decision. Mr. Fogarty stated that, based on the Hyman Decision [State Board] he is recommending to the Board that no salary guide advancement be given to these individuals and that those teachers who were given salary guide advancement be frozen on the salary guide pending a decision by the Appellate Division in Hyman vs. Teaneck Board of Education.***
>
> Mr. Krause [Board Member] asked what action the Board should take at this time. Mr. Fogarty responded the following:
>
> 1. Approve the claim for salary guide placement consistent with years of supplemental teaching experience
>
> /or/
>
> 2. Deny claim.

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Mr. Krause stated he would entertain a motion to uphold the recommendation of the Board Attorney not to grant the application of the individuals who have requested payment. Discussion ensued on this item.***

Discussion: Mrs. Makus [Board Member] asked if cost figures were available. Mr. Argentero responded that the cost would be approximately $30,000.

VOTE 9-0

Motion to be moved is that those individuals who were provided advancement on the salary guide consistent with prior supplemental instruction, be frozen on their present step on the guide because that advancement was improvidently given based on the prior state of the law:***

Discussion: Mr. Kernan [Board Member] asked if there should be a time limit specified in the motion. Mr. Fogarty responded that the salary would be frozen until the guide caught up with their level of compensation.

VOTE 8-1

Abs: M. Nuccetelli***
(Stipulation of Facts (J-1), at pp. 6-7)

Assuming arguendo that Hyman, supra, did indeed stand for "the state of law" on the disputed issue when the Board acted in January 1985 to grant salary guide credit, it cannot, after the fact, reach back and rescind that action at its May 1985 meeting subsequent to the State Board's reversal of the decision. Simply stated, it cannot act to retroactively apply the State Board's decision. See Marshall v. Bd. of Ed. of Twp. of Neptune, decided by the Commissioner April 8, 1985, rev'd State Board January 8, 1986 for the State Board's determination on retroactivity of decisional law.

It is noted by the Commissioner that Hyman, supra, does not specifically address the question presented in the instant matter, namely salary credit for in-district, part-time supplemental/ remedial instruction upon being placed on the teachers' salary guide when becoming full-time teaching staff members. Hyman dealt with a claim of auxiliary teachers to entitlement to placement on the classroom teachers' salary guide in accordance with time served as auxiliary teachers both in and out of the Teaneck School District since the negotiated contract provided for such employment credit.

The type of claim in the instant matter has been addressed by the Commissioner in a number of cases with differing results

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depending on the individual circumstances of each case. Cases where in-district remedial experience was ordered to be credited include Ball et al. v. Bd. of Ed. of Teaneck, decided by the Commissioner August 31, 1984; Walter et al. v. Bd. of Ed. of Teaneck, decided by the Commissioner July 22, 1985, while in Conner, supra, and Baker, supra, it was not. (All except Baker are currently on appeal to the State Board.)

Thus, it is erroneous for the Board to claim that its decision to grant salary credit was a "mistake of law" insofar as no statutory requirement exists to compel or prohibit such salary guide credit when a part-time teacher assumes a full-time teaching position and the case law on the pertinent issue is still not clear, having yielded divergent results dependent on the circumstances. Moreover, in the Commissioner's judgment, the case herein does not represent the type of case conceptualized in Passaic Bd. of Ed., supra, wherein corrective action was permitted for a "mistake of law."

In Passaic, supra, the Appellate Court clearly determined that the plaintiff board was under no legal obligation to pay the disputed tuition costs which it had paid under protest and "under mistake of law" to the Wayne Board of Education. A mistake of law was found because the law controlling the educational program in question placed funding responsibility on the County Board of Chosen Freeholders and it did not authorize said board of freeholders to seek tuition payments from school districts which had children in the county shelter.

Given the above, the Commissioner determines that the Wayne Board of Education, having exercised its discretionary power, for whatever reason, to grant salary guide credit to Petitioners Hochman and Bradley, cannot, on the basis of a school law decision rendered subsequent to its action, be permitted to rescind that action. Having acted to set their salaries at a given level/step on the salary guide in January 1985, those salaries could not be "frozen," absent invocation of N.J.S.A. 18A:29-14 to withhold their increments for inefficiency or other just cause or a Commissioner decision rendered to reduce their salaries pursuant to N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law.

Consequently, the Wayne Board of Education is ordered to advance Petitioners Hochman and Bradley to that point on the salary schedule where they would be had the Board not rescinded the prior action to grant salary guide credit and it is to pay to each any monies denied them by its improper action of May 1985.

COMMISSIONER OF EDUCATION

April 17, 1986

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CAROL BOCKER ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WAYNE, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 17, 1986

For the Petitioners-Appellants, Bucceri and Pincus
(Gregory T. Syrek, Esq., of Counsel)

For the Respondent-Respondent, Fogarty and Hara
(Stephen R. Fogarty, Esq., of Counsel)

For the reasons expressed in his decision, the State Board affirms the Commissioner's determination that claims of three petitioning teaching staff members concerning their placement on the salary guide were time-barred by N.J.A.C. 6:24-1.2. In affirming the Commissioner's determination on this question, we emphasize that this was the only issue before us in this appeal.

September 3, 1986

Affirmed N.J. Superior Court May 22, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1912-86
AGENCY DKT. NO. 79-3/86

DELRAN TOWNSHIP
BOARD OF EDUCATION,
Petitioner,
v.
SEAN CONAWAY and
LEO MAHON,
Respondents.

Ronald J. Ianoale, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)

No appearance by or on behalf of respondents

Record Closed: March 25, 1986 Decided: March 27, 1986

BEFORE DANIEL B. MC KEOWN, ALJ:

The Delran Township Board of Education filed a motion for interim relief before the Commissioner of Education seeking a declaration that nominating petitions filed by Sean Conaway and Leo Mahon for membership to the Delran Township Board of Education are defective as a matter of law because of an asserted failure to have ten legally qualified voters sign their petitions. The Board also seeks an order by which it would be authorized not to have the names of Sean Conaway and Leo Mahon appear on the ballot for Board membership at the election to be held April 15, 1986. The Commissioner of Education transferred the matter on March 20, 1986 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. An emergency hearing was scheduled and conducted March 25, 1986, at the Office of Administrative Law, Mercerville.

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BACKGROUND FACTS

The background facts of the matter according to the evidence of record are these. Sean Conaway filed a nominating petition (P-1) for election to Board membership which contains 11 signatures. A Constance Bianiacci, one of the 11 signatories, executed a notarized verification regarding the ten signatories in the following manner:

> [Constance Bianiacci] being duly sworn or affirmed according to the law on his/her oath deposes and says: That the above petition is signed by each of the signers thereof in his/her own proper handwriting; that the said signers are, to deponent's best knowledge and belief, legally qualified to vote at the election at which the candidate [Sean Conaway] shall be voted for, and that the said petition is prepared and filed in absolute good faith for the sole purpose of endorsing the candidate therein named in order to secure his/her election as a member of the Board of Education.

Candidate Leo Mahon filed a similar nominating petition for election to Board membership which contained ten signatories, one of whom also executed a notarized verification in the same manner that Constance Bianiacci did for Sean Conaway. It must be noted that while this dispute was filed by the Board against both Sean Conaway and Leo Mahon, the Board, through Board counsel, submitted a letter at hearing on March 25, 1986 by which it withdraws its challenge against Mahon because a signatory the Board originally thought was not qualified to sign the nominating petition is in fact and in law so qualified.

BOARD'S PROOFS IN SUPPORT OF ITS MOTION

Sean Conaway, and it is noted Leo Mahon, are both students at the Delran Township public schools. The Board secretary testified that within one or two days after Conaway filed his nominating petition Board member Napoli advised him that he, Napoli, believed several signatures on Conaway's nominating petition were invalid. The Board secretary testified that Napoli directed him to check the validity of each such signature on Conaway's nominating petition. Shortly thereafter, Board member Mull advised the Board secretary of similar concerns he had in regard to the validity of signatures on Conaway's nominating petition.

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The Board secretary contacted the Delran Township municipal clerk who, according to the Board secretary, maintains a "roster" from the "last election". The Board secretary compared the 11 signatories on Conaway's nominating petition with that roster and found two signatories did not appear on the Township clerk's "roster". The Board secretary then personally appeared at the Burlington County voter registration office and searched for those two signatures in the permanent signature register and did not find a page for the two signatories. It is also noted that the Board secretary could not find one of the ten signatories on the Township clerk's "roster" for Leo Mahon nor could he find a page at the Burlington County voter registration office in its permanent signature copy register for that one signatory to Leo Mahon.

The Board secretary, having been in contact with Board counsel, advised the Board of his findings regarding two signatories on Conaway's nominating petition and the one signatory on Mahon's nominating petition. The Board thereafter adopted a resolution by which Board counsel was directed to file the present action against Sean Conaway and Leo Mahon. As earlier noted, the Board has withdrawn the action against Leo Mahon and it is appropriate to set forth the basis for such withdrawal:

> It was averred [by the Board] in the Petitioner's pleadings that Leo Mahon's petition was defective because one of his signers or Affiants was Mr. Jay Flannagan * * * We [the Board] know now that Jay Flannagan is really James Flannagan, and that Mr. Flannagan is, indeed, registered to vote for the April 15, 1986, school election.

The Board secretary testified at hearing that a Board member told him yesterday that Jay Flannagan and James Flannagan are one and the same individual. The Board secretary then contacted the Burlington County voter registration office and received confirmation that James Flannagan is registered to vote. Consequently, the Board withdraws its action against Leo Mahon.

LAW

Board counsel was advised on the record at hearing March 25, 1986, that a question of jurisdiction over this matter exists because of a prior ruling of the Commissioner of Education in In the Matter of the Election Inquiry of the School District of the Township of Monroe, Gloucester County, 1976 S.L.D. 233. In that case, a candidate

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for election to the Monroe Township Board of Education challenged the legality of nominating petitions filed by four candiates who also sought election to the board on the grounds that they failed to have their nominating petitions verified by the oath of one or more of the signers thereof as required at N.J.S.A. 18A:14-11. The candidate also complained that that board secretary allowed those four candidates to make corrections to their nominating petitions after the date upon which nominating petitions were required to be filed. While the Commissioner dismissed the complaint of this candidate, he also stated:

> The Commissioner observes that once a nominating petition is filed, the responsibility of the Board Secretary is to ensure that the blanks on the form are filled in, that ten signatures of endorsement are recorded, that one of those ten signatures also verifies the petition, that the verification is notarized, and that the candidate signs the petition.
>
> Any question with respect to the oath of the signatory who verifies the petition, or any question with respect to the qualifications of the signatures thereon are not within the authority of the Board Secretary to address. These are matters to be adjudicated only by a court of competent jurisdiction * * * When a person who verifies a nominating petition attests, through his/her oath, or certifies that he/she is qualified to endorse a nominee's candidacy, such oath or certification is subject to question only in a court of competent jurisdiction. (Emphasis added)
>
> 1976 S.L.D. at 236.

See also, Kumpa v. Page, 178 N.J. Super. 589 (App. Div. 1981) affirming a judgment of the Superior Court, Law Division, Hudson County, holding that where number of valid signatures on petition was reduced below minimum required by statute due to disenfranchisement of one signer on grounds of conviction of crime, such defect could not be cured. Nonetheless, Board counsel brought to light two later decisions of the Commissioner wherein signatories of a nominating petition were challenged by a board on the grounds at least two of the signatories were not qualified to vote in the district in the annual school election and the petition was therefore flawed. See, Board of Education of Union County Regional High School District No. 1 v. Henry T. Karamus, 1977 S.L.D. 162. In that case the Commissioner, after having a petition of appeal filed before him by the board in which the allegations were made, issued a Show Cause Order against the affected candidate, Karamus, to show cause why his name should not be deleted. After the show cause hearing was conducted and Karamus admitted two of his signatories were not

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qualified to vote, the Commissioner concluded that Karamus' name could not lawfully appear on the printed ballot for the then scheduled school election and he further directed board secretary to delete such name of the ballot. See also, Clarke Township Bd. of Ed. v. Henry T. Karamus, 1977 S.L.D. 259 and Cronin v. Matawan-Aberdeen Regional School District, 1984 S.L.D. ____ (April 2, 1984).

DISCUSSION

In this case, no Show Cause Order was issued against Sean Conaway. Rather, the matter was filed before the Commissioner of Education by the Board as a motion for emergency relief. The matter was immediately transferred to the Office of Administrative Law as a contested case "* * * for immediate hearing * * *".

The latter two opinions of the Commissioner of Education wherein he exercised jurisdiction over the challenge to filed nominating petitions on the qualifications of the signatories are, I **CONCLUDE**, consistent with his broad expanse of authority to hear and determine controversies and disputes which arise under school law. N.J.S.A. 18A:6-9. The school election and all attendant activities, including the filing of nominating petitions, are authorized under Education Law at N.J.S.A. 18A:14-1 et seq. But for Education Law, school elections would not be authorized nor would the filing of nominating petitions for election to board membership be authorized. Accordingly, I **CONCLUDE** that the Commissioner has jurisdiction to hear and determine this controversy.

N.J.S.A. 18A:14-9 provides for the nomination of candidates for board membership to be made by nominating petitions "* * * signed by at least 10 persons none of whom shall be the candidate himself * * *". The ten signatories N.J.S.A. 18A:14-10 requires that all such signatories "* * * are all qualified voters of the school district* * *". Each nominating petition shall be verified by the oath of one or more of the signers that, among other things, " * * * the signers are to the best knowledge and belief of the affiant legally qualified to vote at the election at which the candidate shall be voted for * * *" N.J.S.A. 18A:14-11. The face of the nominating petitions used by the Delran Township Board of Education for its election provide at Part C, Verification, the

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oath of the one who verifies the qualifications of the signatories. Section B of the nominating petition requires only that the signatories certify that the candidate is legally qualified under the laws of New Jersey to be elected a member of the board. Consequently, a serious procedural defect in this matter exists in that Constance Bianiacci, the person who verified Sean Conaway's nominating petition, is not mentioned in the Board's moving papers nor has she been noticed of the proceeding conducted here. While Board counsel contends that its action is against two signatories to Conaway's nominating petition and not against Constance Bianiacci, the fact remains that it is Ms. Bianiacci's oath which verified the qualifications of the 12 signatories.

But even if Ms. Bianiacci's presence is not necessary at this proceeding, the evidence produced by the Board to support its position that two signatories to Conaway's nominating petition are not qualified voters of the district is not persuasive. While the Board secretary testified in an honest and forthright manner before me, and I accept as fact that he personally could not locate any voter registration for two signatories on Conaway's nominating petition, that testimony, accepted as true, does not translate into a finding that the two signatories are not registered to vote. Of particular concern is signatory nine whose surname is simply not decipherable. While the first name "Carole" is clear, the last name is simply not readable. Accordingly, the Board secretary's testimony shows that he was guessing at the spelling of the last name when he was checking voter registration records at both the local and county levels.

In sum, I cannot find the Board secretary's testimony, accepted here as completely true and as recited above, establishes by a preponderance of credible evidence that two signatories on Sean Conaway's nominating petition are not qualified to be signatories thereon. This is not a Show Cause Order proceeding whereby the papers submitted by the Board were deemed by the Commissioner to make out a prima facie case against Conaway and the two signatories and that a failure to respond to such an Order would then operate as a presumption that the assertions made by the Board are true in fact. To the contrary, this is a proceeding brought by the Board for emergency relief and it carries the burden of persuasion. In this case, I am not persuaded that the Board has shown by a preponderance of credible evidence that two signatories on Conaway's nominating petition are not otherwise qualified to be signatories thereon.

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CONCLUSION

I **CONCLUDE** that the Delran Township Board of Education has failed in its burden to establish by a preponderance of credible evidence that two signatories on the nominating petition of Sean Conaway are otherwise not qualified to be signatories on such nominating petition and I further **CONCLUDE** that the Board has failed to produce a preponderance of credible evidence to show that the nominating petition of Sean Conaway is invalid.

The Delran Township Board of Education's motion for emergency relief is, accordingly, **DENIED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 27, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

3/31/86
DATE

Receipt Acknowledged:
Seymour Glaser
DEPARTMENT OF EDUCATION

APR 2 1986
DATE

Mailed To Parties:
Ronald L. Parker, Jr.
OFFICE OF ADMINISTRATIVE LAW

ij

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BOARD OF EDUCATION OF THE TOWNSHIP OF DELRAN, BURLINGTON COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
SEAN CONAWAY AND LEO MAHON, RESPONDENTS.	:	DECISION

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is noted that the Commissioner has inquired and has been advised that the Board will not file any exceptions to the initial decision.

It is also observed that the ALJ's findings and conclusions are limited to Respondent Sean Conaway, inasmuch as the Board's allegations against Leo Mahon were previously withdrawn.

Accordingly, the Commissioner concurs with the findings and recommendations in the initial decision which direct that Sean Conaway's nominating petition for a seat on the Board of Education of Delran at the Annual School Election to be held on April 15, 1986, be declared valid.

The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3610-85
AGENCY DKT. NO. 127-5/85

CAMDEN BOARD OF EDUCATION,
Petitioner,
v.
ELIGIO ORTIZ,
Respondent.

M. Allan Vogelson, Esq., for petitioner (Mitnick, Vogelson, Josselson & De Persia, attorneys)

Barbara E. Riefberg, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: January 27, 1986 Decided: March 5, 1986

BEFORE BRUCE R. CAMPBELL, ALJ:

The Camden Board of Education (Board) certified to the Commissioner of Education charges of conduct unbecoming a teaching staff member against Eligio Ortiz (respondent). The Board determined that the charges, if true in fact, are sufficient to warrant the dismissal of or reduction in salary of the respondent. The matter was transmitted to the Office of Administrative Law on June 12, 1985, as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 31, 1985. The matter was set down for hearing on October 21 and 22, 1985. The respondent moved on October 11, 1984, for dismissal of the charges or, in the alternative, an order compelling answers to interrogatories with a reasonable postponement to prepare for the tenure hearing. The motion was heard via telephone conference call on October 16, 1985. The charges were

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not dismissed because to do so would create an unnecessary expenditure of time and money in that the Board could merely recertify the charges. The matter was adjourned to December 4, 1985. The delay was in no way attributable to the respondent teacher but was occasioned by late answers by the Board to interrogatories. Although I was reluctant to postpone the matter, it appeared that the respondent's ability to prepare his defense would be prejudiced if the matter were to go forward as scheduled; hence, the December 4 date.

The matter was heard on December 4, 1985, at the Merchantville Municipal Court. The parties timely filed posthearing submissions. The respondent received the Board's submission but this office did not. It seems clear that the papers were timely prepared and mailed. The respondent received his copy and prepared his own submission which was received in this Office on January 6, 1986. The Board's counsel, upon being notified that its original papers had not arrived in this Office, quickly supplied a photocopy. The photocopy arrived in this Office on January 27, 1986, and the record was closed at that time.

RELEVANT EVIDENCE

The former superintendent of schools, who filed the instant charges, testified that he went into the respondent's personnel records after seeing a newspaper item concerning the respondent's arrest. On the respondent's original application for employment dated December 4, 1973 (J-1), the respondent stated that he had never been arrested.

The former superintendent asked city and county law enforcement officials for help in determining whether the respondent had any record of such nature as to reflect on his employment as a teaching staff member. The law enforcement officials provided information covering the period May 26, 1972 - July 4, 1984 (J-2, J-3).

The respondent has been charged with assault and battery, threat to kill, breaking and entering, larceny, uttering a worthless check, assault with an offensive weapon and possession of a controlled dangerous substance. Inasmuch as the employment application (J-1) does ask about arrests at any time, and because the respondent entered no to the specific question, the present charges were prepared on March 14, 1985.

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The former superintendent also testified that there is no written policy that covers this circumstance but that past practice of the district has been to look through the records of any employee who is arrested. Police records are then secured and a decision made on a case-by-case basis whether to terminate the employment. The former superintendent named one former employee who was terminated for misstatments on his application. The usual practice is to dismiss such persons immediately.

The witness acknowledged that all but the last incident are unrelated to the respondent's present employment. He did not ask the respondent about the earlier charges. It is the falsification of the application and not the earlier charges that is the basis for the tenure charge here. Although a decision to hire a person who had a criminal record would be on a case-by-case basis, falsification of an application has resulted in automatic termination.

The Director of Personnel in the school district also testified. He stated that he did not speak to the respondent between learning of the respondent's most recent arrest and the filing of tenure charges against him.

In a former case, the district discovered a teacher had forged a transcript from a university. The teacher in that matter was not tenured. The administration began termination proceedings. The teacher was dismissed on the basis of the forged transcript.

The director first knew of the respondent's representation on his employment application that he had never been arrested after the July 1984 arrest for possession of a controlled dangerous substance in Pennsauken. He reviewed the original employment application (J-1) at approximately the same time that the former superintendent reviewed it.

The respondent testified on his own behalf. In 1971, he entered the Teacher Corps Program. All Corps members filled out applications for teaching positions. This was in or about 1971. An interview followed. So far as the respondent can recall, the application was not reviewed during the interview.

On exhibit J-1 he answered "no" to the question concerning arrests because he thought this question meant "had I ever been in jail." There was no intent to hide the other charges. He now knows that the former incidents and events did constitute arrests.

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Concerning earlier charges, the respondent testified that the May 1972 assault and battery charge was filed by his ex-wife. He was never convicted or jailed in relation to the charge. He believes he was only summoned, not arrested. Ultimately, the charges were dismissed. He believed that dismissal equaled a clean record.

Concerning a threat to kill charge and a breaking and entering charge in September 1972, the witness stated that he did break into the apartment of his ex-wife but did so only to "get his belongings." Again, he was summoned. He did not believe he was arrested. Again he believed that dismissal was equivalent to a clean record.

In July 1973, the respondent was charged with uttering a worthless check and assault with an offensive weapon which was a brass knuckle. He stated he had sold a dog to a friend but that the friend neglected the animal. The respondent bought the animal back, paying his friend with a check. The friend took the check to many local stores. They refused to cash the check. "By the time he got to the bank, it has so many signatures," they wouldn't cash it.

Because no bank would honor the check, he and his friend had an altercation. The friend's mother urged the friend to file charges and the friend did so. As in the other incidents, the respondent stated that there was no intent to deceive the Board of Education but, rather, that he believed his record was clean.

The respondent also stated he believes that arrest means the police "take you to the station and book you." The witness did recall being fingerprinted and photographed. Even though he appeared in municipal court three times, he does not believe he was arrested because he went voluntarily. The respondent also stated that he was never told that arrests would remain on his record or he would have moved to have them expunged.

DISCUSSION AND DETERMINATION

The respondent urges that the Board completely lacks evidence of any intentional misrepresentation on his part. He did not deliberately falsify his employment application when he stated that he had never been arrested because he believed he had never been arrested.

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The respondent discussed each of the charges contained in J-2. He explained that the first charge, assault and battery, arose out of a domestic dispute and was filed by his ex-wife. He simply was served with a summons to appear in court and the matter was dismissed when his ex-wife failed to appear. He did not believe it was actually an arrest since he only received a summons, had never been in jail in connection with the charge and the charge was dismissed.

The next group of charges also arose out of a domestic dispute with his ex-wife. She filed the charges against him after a dispute arose concerning personal possessions he had left at the marital residence. As with the first charge, he was served with a summons. His ex-wife again failed to appear in municipal court and the charges were dismissed.

The final set of charges arose out of a neighborhood dispute over the sale of a dog. The respondent testified that a police officer did come to school to serve him with a summons but that the officer agreed to wait until the end of the school day. The respondent testified that he was not handcuffed, but thought he was cooperating in going with the officer to the police station. Although he did appear in Camden Municipal Court for a preliminary hearing on these charges, they were "no billed" by the grand jury. Upon notification that the charges were "no billed," the respondent believed that no record of the charges would be maintained against him.

The petitioner also argues that although he has a college education and is fluent in English, he is only a lay person. He is neither a law enforcement official nor an attorney. To hold him to a standard of knowing the technicalities of what is an arrest as compared to simply being served with a summons or what the legal effect of a dismissal of criminal charges is would be unconscionable.

The petitioner suggests his situation is the same as that in Cleveland Board of Education v. Loudermill, et al., 53 USLW 4306 (Mar. 19, 1985). In that matter, the Cleveland Board of Education hired Loudermill as a security guard. When he filled out his job application, Loudermill stated he had never been convicted of a felony. Upon discovering the fact that Loudermill had been convicted of grand larceny, the Board dismissed him for dishonesty in filling out the job application. Loudermill's defense was that he did not realize his conviction was for a felony, rather he thought it was for a misdemeanor. The Supreme Court held that such a misunderstanding by a lay person is

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"plausible." This adds validity to the respondent's position in this matter that he was not aware that he technically was considered to have an arrest record.

It has been held that a cause of action for misrepresentation consists of a material representation of a presently existing or past fact, made with knowledge of its falsity and with the intention that the other party rely on it, resulting in reliance by that party to his detriment. See, Foont-Freedenfeld v. Electro-Protective, 126 N.J. Super. 254, 257 (App. Div. 1973), aff'd 64 N.J. 197 (1974). In the present case, the Board was not able to show by a preponderance of the credible evidence that the respondent knowingly falsified his employment application. Furthermore, the Board did not establish that it relied on the statement in the application to its detriment. Having failed to establish these two, critical elements, the Board has not met its burden of proving the tenure charge against the respondent.

Even if it is found that the charge against the respondent has been proven, dismissal is too harsh a penalty. Petitioner believed that he was answering the arrest question truthfully. In addition, he taught for 11 years without any problems and the tenure charge has nothing to do with his teaching ability or performance.

The Board argues that the respondent's police record, secured from the State Police and FBI, verifies the nature and existence of prior arrests. At no time after making his initial application for employment did the respondent ever communicate to the Board that he had had pre-employment arrests nor did he attempt to explain their existence.

Testimony adduced indicated that an intentional falsification would have resulted in his being denied employment and, in fact, in one instance such intentional falsification did result in a teacher dismissal. Finally, administrators testified that a teacher is a role model and, therefore, intentional lying would be grounds for dismissal no matter what the reason. Serious charges such as the latest charge against the respondent, even though dismissed, could also result in a dismissal from a teaching position because of the sensitive nature of the teacher-student relationship.

The respondent was the only witness on his behalf. He defended against the charges and asked for their dismissal on the grounds that he did not understand the meaning of the word "arrest." He testified that he thought "arrest" meant going to jail.

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He reasoned that, because he never went to jail, he believed he was answering honestly when he said he had never been arrested.

The respondent admits speaking and reading English fluently. He teaches in English. He is a graduate of a state college where he was instructed in English. Finally, and most significantly, he recounted to this tribunal (in the process of explaining one of the arrests set forth on his "rap" sheet) that he was told by either a principal or other employee of the school to which he was assigned at the time that "a police officer was there to arrest him. . . ." Further, the respondent went on to admit that the officer was there in uniform. He acknowledged that had the officer not relented, on condition that the respondent surrender later in that day, the respondent would have been taken from the school at that time based on the charge that had been filed.

In light of the testimony, the Board believes that the respondent's testimony is incredible and that the charges as stated should be upheld.

As to sanction, the Board believes that the factual circumstances that gave rise to this charge show an intent and state of mind of dishonesty. While recent charges did not result in a conviction, it was as a result of the charges being preferred that the respondent's prior criminal record came to light.

The teacher-student relationship is a sensitive one and the teacher is and should be a role model for his students. Intentional, knowledgeable lying, which is then sworn to under oath before this tribunal, certainly disqualifies the respondent from further employment.

Having heard and observed the respondent as he testified, I cannot accept his statements that he did not believe he ever had been actually arrested. He is neither a law enforcement official nor an attorney. As such, he may not be held to a standard of knowing the technicalities of arrest and the dismissal of criminal charges. He is, however, of sufficient age, intelligence and experience to be chargeable with the knowledge that encounters with the legal system as described above are going to create a record. Furthermore, being fingerprinted and photographed should alert even the most casual television viewer that he is in the arms of the law. Exhibit J-2 indicates that

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fingerprints of the respondent were submitted to the FBI by the Camden County Sheriff's Office, the Camden Police Department and the Pennsauken Police Department. It flies in the face of common sense that someone who has been subject to these procedures can also maintain that he has never been arrested.

Loudermill, above, is not on point with the present case. Loudermill was not a college-educated teacher. More importantly, Loudermill had no opportunity to respond to the dishonesty charge or to challenge his dismissal. The fact that the respondent here is before the Commissioner of Education obviates any attempt to analogize Loudermill.

Nor is Foont-Freidenfeld apposite. That case, indeed, speaks to a cause of action for misrepresentation. However, it arose in a contract law context, not a school law context. It has long been held that:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. When a teacher deliberately and wilfully . . . violates the public trust placed in him, he must expect dismissal or other severe penalty as set by the Commissioner. Tenure of Tordo, 1974 S.L.D. 97, 98-99. (Emphasis added.)

The party who has the burden of proof in an administrative hearing must prove the case by a preponderance of the evidence. This tribunal, therefore, must decide in favor of the party on whose side the weight of the evidence preponderates, and according to the reasonable probability of the truth. Jackson v. D.L. & W.R.R., 111 N.J.L. 487, 490 (E. & A. 1933). The evidence is found to preponderate if "establishes 'the reasonable probability of the fact.' " Jaeger v. Elizabethtown Consolidated Gas Co., 124 N.J.L. 420, 423 (Sup. Ct. 1940) (citation omitted). Where the standard is reasonable probability (preponderance of the evidence), the evidence must be such as to "generate belief that the tendered hypothesis is in all human likelihood the fact." Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959), overruled on other grounds, 36 N.J. 487 (1962).

A factor to be considered in a determination as to which party's version of a case has the "reasonable probability of the truth" is that "[t]he interest, motive, bias or prejudice of a witness may affect his credibility and justify the [trier of fact], whose province it is to pass upon the credibility of an interested witness, in disbelieving his

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testimony." State v. Salimone, 19 N.J. Super. 600, 608 (App. Div. 1952) (citations omitted), certif. den. 10 N.J. 316 (1952). Further, a "trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony." Congleton v. Pura-Tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). See also, In re Perrone, 5 N.J. 514 (1950).

In evaluating the testimony of the witnesses, it is observed that the respondent's testimony is not consistent with common experience. The testimony of the school administrators was candid, forthright and was presented in a direct and detailed manner. Accordingly, when fairly considered and weighed, the testimony of the school administrators produces the stronger impression, is more convincing and has the greater weight when put against the testimony offered by the respondent. I so **FIND.**

I also **FIND:**

1. The respondent stated on his initial application for employment by the Camden Public Schools that he had never been arrested (J-1).

2. That application was made on December 4, 1973.

3. Records of the Federal Bureau of Investigation (J-2) show that the respondent was charged on May 26, 1972, with assault and battery; was charged on September 28, 1972, with threat to kill, breaking and entering and larceny; and was charged on January 13, 1973, with uttering a worthless check and assault with an offensive weapon.

4. On each of these occasions, the respondent was fingerprinted.

In consideration of the foregoing, I **CONCLUDE** that Eligio Ortiz knowingly and wilfully submitted false information on his application for professional employment with the Camden Public Schools, dated December 4, 1973. I further **CONCLUDE** that this constitutes conduct unbecoming a teaching staff member. Therefore, I further **CONCLUDE** that Camden Board of Education has proven the charge against the respondent.

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The respondent's conduct rises to the level of unbecoming conduct within the meaning of the court's ruling in Redcay v. State Board of Education, 130 N.J.L. 369, 371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A. 1944) in which it was said:

> Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. (Emphases added.)

Accordingly, it is **ORDERED** that the respondent is dismissed from his position as a teaching staff member in the employ of the Camden Board of Education as of the date of his suspension.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

5 MARCH 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

MAR - 6 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 10 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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WITNESS LIST

Dr. Charles Smerin
Ramsey Koumjian
Eligio Ortiz

EXHIBIT LIST

J-1	Application for professional employment, December 4, 1973
J-2	Criminal history record information, Federal Bureau of Investigation
J-3	Criminal history record information, New Jersey State Police

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IN THE MATTER OF THE TENURE	:	
HEARING OF ELIGIO ORTIZ, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF CAMDEN,	:	DECISION
CAMDEN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by respondent within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Respondent contends that the ALJ improperly shifted the focus of the instant matter and based his determination on facts beyond the scope of the charges, namely, whether respondent intentionally falsified his application for employment with the Camden School District in 1973.

Respondent further avers that the ALJ's initial decision is unreasonable and arbitrary as it is based on irrelevant considerations beyond the scope of the tenure charges. Respondent argues that the determination of whether he intentionally falsified his application must be considered in light of his state of mind at the time he filled out the application, not in light of all the circumstances to date. Respondent cites In re Deer, 1975 S.L.D. 752 and a former instance of misrepresentation in the Camden School District as examples of situations different from the instant matter in that the misrepresentations in the latter two instances were ongoing and related to those individuals' teaching credentials. Respondent argues that in 1973 when he filled out his application, he did not know exactly what constituted an arrest and, further, that he believed that dismissal of the charges against him equaled a clean record, i.e., never having been arrested. Respondent reiterates his position advanced at the hearing that he did not intend to answer the question at issue untruthfully. He further avers that the alleged misrepresentation does not directly relate to his teaching credentials as in Deer, supra, and the other Camden City misrepresentation matter. Thus, respondent argues, he did not make a continuous misrepresentation, nor did he knowingly misrepresent his past. Therefore, he contends, the ALJ's decision must be rejected.

Respondent further avows that the ALJ erroneously based his determination as to whether respondent honestly believed when he filled out his application in 1973 that he had never been arrested on his evaluation made of respondent at the hearing in 1986. Respondent urges the Commissioner to consider whether he intentionally falsified his application based on his state of mind, age, intelligence and experience as he was as a college student in 1973.

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Finally, respondent contends that, even if he is found to have intentionally falsified his application in 1973, the penalty imposed by the ALJ, dismissal from his tenured position, is too harsh and is based on extraneous considerations which seriously prejudice respondent's rights. Respondent cites In re Fulcomer, 93 N.J. Super. 404 (1967), for the proposition that a teacher has a right to an "independent determination as to the scope of the penalty." (Respondent's Exceptions, at p. 6, quoting In re Fulcomer, supra, at 418-22) Respondent avers that in accordance with Fulcomer, the ALJ should have analyzed the evidence surrounding the incident alleged to constitute the unbecoming conduct to determine the nature and gravity of the offense and considered any mitigating circumstances as well as the impact of the incident on the administration of the school system. (Respondent's Exceptions, at pp. 6-7, citing Fulcomer, supra at 422) Respondent suggests that all the actual charges which led to his arrests were dismissed and are not at issue in the instant matter and that the falsification of the application is the only basis for the tenure charges herein, not the incidents leading to his arrests.

Respondent contends that the recent incident, his arrest in July 1984 for possession of a controlled dangerous substance, should not enter into a determination regarding sanction since it was outside the scope of the tenure charges and out of line with the analysis required by Fulcomer. Respondent argues that it is illogical that factual circumstances giving rise to the present charge can show an intent and state of mind of dishonesty for an act which occurred in 1973. Additionally, respondent argues that "Fulcomer states that evidence concerning the individual teacher, teaching experience and background, impact of dismissal on the teacher's teaching career, his record of performance and prognosis for continued effective performance should be analyzed to determine an appropriate penalty." (Respondent's Exceptions, at pp. 8-9, citing Fulcomer, supra, at 421-422) Respondent contends that the record does not reveal that any of these factors were taken into consideration and that the penalty determination is thus clearly improper and must be rejected.

Having reviewed the record in the instant matter, the Commissioner agrees substantially with the determination of the ALJ and rejects the exceptions of respondent as being essentially without merit for the following reasons.

The issue before the Commissioner is respondent's failure to accurately inform his prospective employer of his arrest record. Respondent has argued that he was not aware exactly what it meant to be arrested at the time in question, 1973, which could be considered a viable argument if he were able to demonstrate he was a citizen worthy of such credibility. While the arrests are not the subject of the tenure charges filed in this matter, the Commissioner observes that the tenure charges did allude to the fact that publication of respondent's most recent arrest was the triggering event that led the principal to review respondent's application for employment in the Camden City school district. The fact that respondent was not convicted of any of the charges which were the

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bases for his arrests does not detract from the fact that the nature of his behavior and the notoriety created by such events may clearly rise to the level of conduct unbecoming a teacher. The Commissioner has stated in In the Matter of the Tenure Hearing of John LaTronica, School District of the City of New Brunswick, Middlesex County, decided by the Commissioner, September 6, 1983:

> Acquittal of a criminal charge arising out of the same incident does not preclude the Commissioner of Education from sustaining the tenure charge, since the standard of proof in an administrative proceeding (i.e., by a preponderance of the evidence) is much less than the standard of proof in a criminal prosecution (i.e., beyond a reasonable doubt). Atkinson v. Parsekian, 37 N.J. 143 (1962); cf., Manalapan-Englishtown Ed. Ass'n. v. Bd. of Ed., 187 N.J. Super. 426, 431 (App. Div. 1981) (at p. 8)

The Commissioner concurs with the ALJ's analysis of the pertinent case law cited herein and stresses that it has been previously stated in In the Matter of the tenure Hearing of Ernest Tordo, School District of the Township of Jackson, Ocean County, 1974 S.L.D. 97:

> Teachers are public employees who hold positions demanding public trust, and in such positions they teach, inform, and mold habits and attitudes, and influence the opinions of their pupils. Pupils learn, therefore, not only what they are taught by the teacher, but what they see, hear, experience, and learn about the teacher. (at 98-99)

Further, the Commissioner reminds respondent that teachers of this State are

> professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self-restraint and controlled behavior rarely requisite to other types of employment. As one of the most dominant and influential forces in the lives of the children, who are compelled to attend the public schools, the teacher is an enormous force for improving the public weal. Those who teach do so by choice, and in this respect the teaching profession is more than a simple job; it is a calling.

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(In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, Camden County, 1972 S.L.D. 302 at 321)

The episodes respondent described which resulted in his arrests prior to his application for employment with the Board create doubts as to respondent's credibility, a consideration the ALJ was entirely within his authority to incorporate in making a determination regarding the truthfulness of respondent's allegation that he didn't understand the meaning of the word "arrest." The Commissioner accepts the ALJ's conclusion that respondent is an incredible witness. While he purports to be a model citizen, he, in fact, has had continuous scrapes with the law. Furthermore, respondent's casting himself as an unsophisticated college student unaware of the meaning of the word "arrest" at the time of his filling out the application with the Board in 1973 strains credulity insofar as the record reveals respondent was 29 years old at the time he applied for employment with the Board and had already been arrested three times.

Consequently, while the Commissioner accepts respondent's argument that the only matters before the Commissioner are those events that transpired before or concurrent with the respondent's application for employment with the Camden City Board of Education in 1973, he soundly agrees with the ALJ that respondent "knowingly and wilfully submitted false information on his application for professional employment with the Camden Public Schools, dated December 4, 1973." (Initial Decision, ante) The Commissioner further finds, as did the ALJ, that respondent's conduct rises to the level of unbecoming conduct within the meaning of the Court's ruling in Redcay v. State Board of Education, 130 N.J.L. 369 (Sup. Ct. 1943, aff'd 131 N.J.L. 326 (E. & A. 1944) in which it was said:

> Unfitness for a position under the school system is best evidenced by a series of incidents. Unfitness to hold a post might be shown by one incident, if sufficiently flagrant, but it might also be shown by many incidents. Fitness may be shown either way. (Emphases added.)
> (Initial Decision, ante)

Accordingly, the Commissioner adopts the recommended conclusions of the Office of Administrative Law. He directs that respondent be dismissed from his position as a teaching staff member in the employ of the Camden Board of Education as of the date of this decision. It is further ordered that this matter be forwarded to the State Board of Examiners for its review and, in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 21,1986

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IN THE MATTER OF THE TENURE	:	
HEARING OF ELIGIO ORTIZ, SCHOOL	:	STATE BOARD OF EDUCATION
DISTRICT OF THE CITY OF CAMDEN,	:	DECISION
CAMDEN COUNTY.	:	
	:	

Decided by the Commissioner of Education, April 21, 1986

For the Petitioner-Respondent, Mitnick, Vogelson, Josselson and Depersia (M. Allan Vogelson, Esq., of Counsel)

For the Respondent-Appellant, Selikoff and Cohen (Barbara E. Riefberg, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
(ON APPLICATION FOR)
EMERGENT RELIEF
OAL DKT. NO. EDU 1272-86
AGENCY DKT. NO. 11-1/86

BARRINGTON BOARD OF EDUCATION,
Petitioner,
v.
THEORDORE T. HEINS,
Respondent.

Robert F. Blomquist, Esq., for the petitioner (Davis, Reberkenny & Abramowitz, attorneys)

M. Allan Vogelson, Esq., for the respondent (Mitnick, Vogelson, Josselson & DePersia, attorneys)

Record Closed: March 11, 1986 Decided: March 21, 1986

BEFORE **AUGUST E. THOMAS,** ALJ:

On January 15, 1986, the Barrington Board of Education (Board) filed with the Commissioner of Education a Notice of Motion for Order to Show Cause; two certifications; proposed form of Order to Show Cause; brief in support of Order to Show Cause; and Petition of Appeal (with exhibits); seeking the removal of a member of the Board, Theodore T. Heins, respondent.

On February 24, 1986, the Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. An oral argument on the motion was conducted in the Office of Administrative Law on March 11, 1986.

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Since no Order to Show Cause was issued, the Board moved the matter on its two certifications, supporting brief and its argument.

At a public meeting of the Board on June 3, 1985, and in response to a letter from one of its school principals requesting that he be permitted to rescind his resignation, the Board president directed that a copy of all documentation concerning the principal's evaluation be sent to each Board member and that the principal's request for rescission of his resignation be placed on the agenda of the June 24, 1985 Board meeting. Each Board member received a packet of the aforementioned documents. By writing dated June 21, 1985, the Board president requested that all Board members bring the "Confidential Work Product Information Packet" to the Board meeting on June 24 so that it could be shredded at the conclusion of the meeting.

Respondent Heins did not surrender the packet of materials at the conclusion of that Board meeting. Neither did he surrender the packet as requested by letter from the Board president dated June 26, 1985. By letter of same date, respondent notified the Board president that he had not expected to receive the confidential work product information packet and that he had not had time to absorb all of the information he needed. He promised to return the packet at a later date. At a public meeting of the Board on July 15, 1985, the Board resolved to censure respondent for his failure to return the packet of materials. Respondent was admonished that he had a legal and ethical responsibility to follow appropriate policy guidelines of the Board and that the Board was acting within its statutory and discretionary authority when it demanded that the packet of materials be returned.

In its conclusion, the Board resolution censured respondent and removed him from all committees of the Board and from his new position as delegate to the New Jersey School Boards Association. He was directed to return the Confidential Work Product Information Packet to the Board Secretary/School Business Administrator without disclosing the contents to anyone and without making any copies for his own personal custody.

Subsequent to respondent's censure by the Board on August 19, 1985 at a public meeting of the Board, the Superintendent uttered a statement about respondent which respondent considered wholly false, uttered maliciously and was defamatory.

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As a result of the Board's censure and the Superintendent's alleged defamatory statement, respondent filed two civil complaints in the Superior Court of New Jersey, Law Division, Camden County, seeking a detraction of the Superintendent's statement with public apology, and demanding judgment for compensatory and punitive damages. Respondent's other suit against the Board seeks a retraction of the Board resolution of censure and a public apology from the Board for its adoption of the resolution and the subsequent actions of the Board president and the Board Secretary/Business Administrator which interferred with respondent's right to exercise and enjoy all the rights and carry out all the duties of a duly elected member of the Board.

As a result of these two law suits in the Superior Court of New Jersey, the Board determined that respondent's claims against the Board disqualified him from holding office as a Board member pursuant to N.J.S.A. 18A:12-2. Accordingly, the Board filed its Petition of Appeal with the Commissioner followed by its Notice of Motion for emergency relief seeking respondent's removal from his seat as a Board member for being in violation of the aforementioned statute.

I have reviewed the moving papers, considered the oral arguments, and read the statutes and cases cited by counsel. In my view, the statute N.J.S.A. 18A:12-2, dealing with conflicts of interest, has not been interpreted in the cited cases to deal with matters such as presented here today. Each of the cited cases has a fact pattern distinguishable from the matter considered here.

The simple issue before me today, is whether or not there is a conflict of interest, given the fact that respondent has sued the Superintendent and certain members of the Board and its agents (see N.J.S.A. 18A:12-2).

From my review, I cannot **CONCLUDE** that a conflict of interest exists pursuant to statute. Respondent has a right to seek redress. However, a real problem exists for the Board because of Mr. Heins' suit and the fact that he remains a Board member.

The Board solicitor is bound by statute to save harmless the Board members and the Superintendent, from any act arising out of their duties (N.J.S.A. 18A:12-20; 18A:17-20). In carrying out this responsibility, he must meet with the Board in executive session to decide strategy. In these executive sessions it is ludicrous to have respondent in attendance while his litigation against the Board is being discussed.

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Accordingly, Mr. Heins is hereafter barred from that portion of any executive session called by the Board for the sole purpose of discussing his litigation against the Board. This Order will terminate upon the completion of respondent's litigation in Superior Court.

Absent a showing of a conflict of interest, the Boards Motion to Show Cause and its application to remove respondent from his seat as a Board member is **DENIED.**

The original decision in this matter was forwarded to the Department of Education on March 11, 1986 as an Order, Emergent Relief. This amended decision is correctly titled Initial Decision (on application for) Emergent Relief. Accordingly, the concluding parapraphs for the Commissioner's consideration for has been amended.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 March 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

MAR 24 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 26 1986
DATE

Mailed To Parties:
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF BARRINGTON, CAMDEN COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THEODORE T. HEINS, RESPONDENT.	:	DECISION

The record, the original decision issued on March 11, 1986 as an Order for Emergent Relief, and the amended Initial Decision (On Application For) Emergent Relief issued on March 21, 1986 have been reviewed. By consent of the parties and the Commissioner, exceptions originally filed by the parties in response to the Order for Emergent Relief dated March 11, 1986, which were deemed to be timely pursuant to N.J.A.C. 1:1-16.4a, b and c, were resubmitted in response to the identical language contained in the amended Initial Decision filed on March 21, 1986.

The Board's initial exception reiterates the argument it proffered at the hearing on its application for emergent relief that the statutory language of N.J.S.A. 18A:12-2 is clear on its face and requires the immediate removal of respondent as a Board member, under the circumstances of the case. In the alternative, the Board reiterates its argument that a dispositive decision by the State Board of Education in Woodstown-Pilesgrove Regional Board of Education v. John J. Ketas, 1980 S.L.D. 1563 requires the immediate removal of respondent and that attempts to interpret and construe the legal effect of respondent's actions were inappropriate.

Secondly, the Board avers that the ALJ committed a clear error of law in finding, by implication, that a conflict of interest existed due to the presence of respondent in executive session during discussion of the lawsuits that he has filed against the Board while at the same time finding no conflict under the statute N.J.S.A. 18A:12-2. The Board argues that

> the clear scope of the statute eliminates any discretion by an Administrative Law Judge when claims have been brought against a board of education or any of its members, which claims seek personal relief, as opposed to relief in the public interest. Clearly, the lawsuit brought directly against the Board, the Board President and the Board Secretary, for removal of a censure resolution passed by the Board against Mr. Heins, was a direct claim against the Board under the statute.*** (emphasis in text)
>
> (Board's Exceptions, at p. 4)

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Further, the Board contends that in the case brought by respondent against the superintendent, since the superintendent is an ex officio member of the Board under N.J.S.A. 18A:17-20, "Mr. Heins' claim against the Superintendent is at the very least an 'indirect' claim against the Board under N.J.S.A. 18A:12-2." (Id., at p. 4) The Board cites Woodstown-Pilesgrove Regional Board of Education, supra, for the proposition that a disqualifying claim under the statute applies not only to a pecuniary interest but to a psychological or personal interest as well. (Id., at p. 4) The Board further contends that Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App.Div. 1956) supports this proposition. Also, the Board avers that Board of Education of the City of Newark v. Edgar Brown and Oliver Brown et al., decided by the Commissioner May 2, 1984 does not in any way change the prevailing rule in Woodstown-Pilesgrove nor the language of N.J.S.A. 18A:12-2. The Board contends that Brown stands for the proposition that "a claim for legal fees did not 'automatically disqualify the person making such claim from serving on a board of education'*** and that 'each case must be examined to determine whether the claim is substantial and material as to require disqualification.'***" (Id., at p. 5) The Board avers that the facts in the case at bar went beyond the facts in Brown and, further, that the ALJ's reasoning is "illogical and contradictory" (Id., at p. 6) in foreclosing respondent from attending executive sessions wherein his litigation is discussed by the Board when, at the same time, the ALJ held there was no violation of N.J.S.A. 18A:12-2. The Board calls for the Commissioner to reverse the ALJ, immediately remove respondent from his seat on the Board and declare a vacancy.

Respondent's exceptions initially take issue with the procedural stance of the instant Petition of Appeal. Respondent avers, in pertinent part:

> ***It should be noted at the outset that in the Brief supporting the motion before Judge Thomas, the Board maintained that this Petition of Appeal could be resolved on the pleadings alone. (See the 1st sentence of the last paragraph on p. 6 of the Board's supporting Brief attached to the Notice of Motion for expedited interlocutory review) The Board has now filed a Motion for expedited interlocutory review while at the same time in its letter of exceptions asks the Commissioner to reverse the Administrative Law Judge, remove Mr. Heins from his seat on the Board and declare a vacancy. The Board, therefore, seems to be in conflict in the remedy that it seeks. Does it seek an interlocutory review requiring, by implication, a further hearing to determine facts, or is it conceding that there is no factual issue and the Petition of Appeal can be resolved as a matter of law?

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> That is unclear to this writer upon reviewing the letter of exceptions and the Motion for expedited interlocutory review together.
>
> (Respondent's Exceptions, at pp. 1-2)

Further, respondent distinguishes all the case law cited by the Board. Respondent distinguishes Woodstown-Pilesgrove, supra, on the basis that it was a suit against the board. Herein, respondent avers, his suit is against Malony, the superintendent, individually. Also, respondent's suit against the superintendent cannot lead to payment of damages by the Board, even if respondent is successful. Citing Errington v. Mansfield Twp. Board of Education, 100 N.J. Super. 130 (App. Div. 1968), respondent contends the Court in that case held that the board was not responsible to defray costs of defending the defamation suit brought against a board member or to indemnify a member for the cost of such suit, since the board member acted individually and not in the course of his duties and was beyond his authority. Respondent supports reliance on Board of Education of the City of Newark v. Edgar Brown and Oliver Brown, supra, on the basis that removal of the board member herein was not automatic and was not necessary under facts substantially similar in substance to the facts involved in the instant appeal. Respondent distinguishes all other cases cited by the Board as situations involving clear conflicts of interest. Respondent contends that the ALJ's Order fashioning an equitable remedy precluding respondent from participation in discussion concerning the litigation involving respondent was appropriate. Respondent adds that a review of the certifications of the Board's attorney and Board President, filed in support of the Board's Motion for Emergent Relief, does not reveal any allegation of the Board's inability to function with respondent present and participating save for the instance where discussion took place, in executive session, concerning the litigation involving respondent. Respondent contends there is no conflict, real or implied, in substance with the ALJ's conclusion, and his decision should be upheld.

The Commissioner's review of this matter reveals that the ALJ offers no legal discussion or justification in arriving at his determination that no conflict of interest exists pursuant to N.J.S.A. 18A:12-2. Consequently, the Commissioner remands the ALJ's determination for a close and careful analysis of the cases and issues concerned herein. The Commissioner particularly calls to the attention of the parties the standard of review enunciated in a variety of cases and summarized in Board of Education of the City of Newark v. Edgar Brown and Oliver Brown et al., supra.

Accordingly, for the reasons expressed herein, the Commissioner remands the instant matter for action consistent with the determination herein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5700-85
AGENCY DKT. NO. 271-8/85

EDWARD BUZINKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Patrick C. English, Esq., for respondent (Dines and English, attorneys)

Record Closed: March 7, 1986 Decided: March 7, 1986

BEFORE **TIMOTHY N. TUTTLE**, ALJ:

Petitioner, Edward Buzinky, a tenured principal employed by the respondent, the City of Clifton Board of Education, appeals the action of the Board on June 26, 1985, withholding his salary increment for the 1985-86 school year. Specifically, the petitioner alleges that the withholding of his salary increment was invalid by reason of arbitrariness, capriciouness, unreasonableness and a violation of the Open Public Meetings Act. The Board of Education, conversely denies the petitioner's allegations and asserts that its action was a legal exercise of its discretionary authority and conducted in conformance with the Open Public Meetings Act.

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The petitioner filed his appeal with the Commissioner of Education on August 7, 1985. On September 10, 1985 it was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. On October 25, 1985, the matter was preheard and a prehearing order was entered which set forth the following issues for determination at the plenary hearing.

(1) Was there a violation of the Open Public Meetings Act?

(2) Was the Board of Education of the City of Clifton arbitrary, capricious or unreasonable in holding Mr. Buzinky's increment?

On January 27, 30 and 31, 1986, the matter was heard. At the commencement of the hearing a partial Stipulation of Facts was entered by the parties. Based upon the said stipulation I FIND the following as undisputed facts:

1. Petitioner is a tenured principal in the Clifton School District, having been employed in that position from February 1, 1981 to the present.

2. From December 1, 1981, to June 30, 1985, petitioner was assigned as principal of Woodrow Wilson Junior High School.

3. For some time prior to June 26, 1985, the petitioner was aware that on that date the Board of Education of the City of Clifton would be considering whether to award salary increments to all teaching staff members, including himself.

4. On June 21, 1985, petitioner received an "Administrator Confidential Evaluation" from his supervisor, the Director of Secondary Education.

5. The petitioner was provided with a copy of the Increment Policy of the Clifton Board of Education, and had been in possession of said policy for years prior to June 26, 1985, and at least since 1980. That policy states in pertinent part:

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> No increment or increase is to be considered as automatic or mandatory. An increment or increase is to be considered earned by an eligible employee only after satisfactory service is so indicated affirmatively by the supervisor of the employee and the superintendent and the increment is passes by the Board of Education. [emphasis added]

6. On June 21, 1985, Edward Buzinky met with the Director of Secondary Education, his superior. At that time the Director of Secondary Education informed the petitioner that he was contemplating recommending withholding the increment of the petitioner to the Board in connection with the June 26, 1985 Board meeting.

7. At approximately 3:00 p.m. on June 26, 1985, the petitioner received written notice that the Board of Education would that evening receive a recommendation not to award a salary increment/salary increase for the 1985/86 school year. The letter, which was written by the Director of Secondary Education, stated that:

> This action is a result of your performance for the current 1984-85 school year. The reasons are outlined in your evaluation.

8. The letter further stated that:

> The Board will act on this matter at their meeting on Wednesday, June 26, 1985 at 8:00 p.m. at the Administration Building. It is your right to request that the discussion take place in public as opposed to executive session. Unless the request is received no later than 4:00 p.m. today the discussion, but not the vote, will take place in executive session.

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The petitioner was verbally informed, however, by the Director of Secondary Education that he could request public discussion up until the time the Board meeting commenced.

9. Petitioner at no time requested public discussion.

10. On June 26, 1985, the Board of Education of the City of Clifton voted unanimously to withhold both the increment of petitioner and his salary adjustment.

11. On June 28, 1985, the secretary of the Board of Education of the City of Clifton sent the followiong letter to Edward Buzinky:

> This is to officially advise you that the Clifton Board of Education at its meeting of June 26, 1985, voted to withhold, for reasons of good cause as you were previously informed, a salary increment/salary increase for the 1985/86 school year and furthermore agreed that your current salary guide step be maintained with no advancement on the guide.

12. At all times since 1980 the petitioner has had a written policy adopted by the Board of Education of the City of Clifton pertaining to increment withholdings. That policy states, in pertinent part, that an employee whose increment may be withheld has the "right to request that the Board discuss the matter in public session. Unless such a request is received, discussion (but not the vote) may take place in executive session."

13. On July 5, 1985, petitioner provided a document captioned "rebuttal to evaluation of 1984-85" to the Secretary for the Board of Education and requested that it be forwarded to the full Board. The Board Secretary did so.

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14. Despite petitioner's "rebuttal" the Board did not reverse its earlier decision to withhold his increment.

15. No request was made for the Board to defer action concerning Mr. Buzinky's increment by the petitioner.

16. The Board meeting at which the increment of the petitioner was discussed was a regularly scheduled meeting and was duly advertised according to law.

At the plenary hearing four witnesses testified: Owen T. Engler, the Director of Secondary Education, William C. Liess, Assistant Superintendent of Schools; William Cannici, a vice principal and petitioner. There is no need to discuss the testimony of the four witnesses at length, which I found credible and believable. Both the respondent's and petitioner's witnesses' testimony was in agreement and I **FIND** as additional **FACTS** as follows:

1. At no time from June 21, 1985 through June 26, 1985, was a conference specifically scheduled between the Director of Secondary Education and the petitioner to specifically discuss the performance evaluation prior to the filing the evaluation with the respondent.

2. On June 24, 1985, the petitioner advised the Director of Secondary Education that he needed time to prepare a rebuttal to the Director's performance evaluation.

3. The Board of Education on June 26, 1985, in denying the salary guide increment to the petitioner considered and substantially relied upon the performance evaluation by the Director of Secondary Education which was totally devoid of petitioner's input.

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1. Salary Increment

N.J.A.C. 6:3-1.21(e) and (f) mandate certain substantive procedural requirements in the preparation of a tenured faculty member's performance evaluation.

N.J.A.C. 6:3-1.21 provides:

> (e) The annual summary conference between supervisors and teaching staff members shall be held before the written performance report is filed.
>
> The conference shall include but not be limited to:
>
> 1. Review of the performance of the teaching staff member based upon the job description;
>
> 2. Review of the teaching staff member's progress toward the objectives of the individual professional improvement plan developed at the previous annual conference;
>
> 3. Review of available indicators of pupil progress and growth toward the program objectives;
>
> 4. Review of the annual written performance report and the signing of said report within five working days of the review.
>
> (f) The annual written performance report shall be prepared by a certified supervisor who has participated in the evaluation of the teaching staff member and shall include but not be limited to:
>
> . . .
>
> 5. Provisions for performance data which have not been included in the report prepared by the supervisor to be entered into the record by the evaluatee within 10 working days after the signing of the report.

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N.J.A.C. 6:3-1.21(h)(9) defines the term "Teaching staff member" to include all professional staff members including principals such as the petitioner. A review of the regulatory scheme of N.J.A.C. 6:3-1.21 et seq. indicates that a fair, objective and accurate performance evaluation requires the involvement, input and participation of the evaluatee in the evaluation process.

In the instant matter it is undisputed that the respondent Board of Education failed to follow the above cited evaluation procedures mandated by the State Board of Education. It is clear that in preparing the performance evaluation the petitioner was denied the opportunity to discuss his perceived deficiencies and given an opportunity to defend and possibly convince his evaluator to the contrary. Additionally, the petitioner was deprived of his opportunity to place performance data into the performance evaluation report which were ommitted by the evaluator. The Board of Education in denying the petitioner his annual increment consequently relied upon a defectively and improperly prepared performance evaluation.

Furthermore, in the matter sub judice, the Board of Education established additional rules in its own policy and administrative guidelines. See, Policy For Withholding An Increment (J-5) and General Administration Notice #8 (J-7). Clifton Board of Education policy specifically states in pertinent part:

> Prior to any recommendation to the Board to withhold an increment, the affected employee shall be notified by his/her immediate supervisor of the proposed recommendation and the reasons therefore. The employee shall be given the opportunity to discuss the proposed recommendation with his/her supervisor and shall be given the opportunity to convince the supervisor that the reommendation should not be made. Withholding, supra

It is clear from the record that petitioner was not given an opportunity to discuss the proposed recommendation with his supervisor nor given the opportunity to convince the supervisor that the recommendation should not be made. Petitioner was not even notified that such a recommendation would be made until five hours before the Board of Education meeting.

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N.J.A.C. 6:3-1.21 empowers district boards of education to establish policies and procedures regarding the annual evaluation of all tenured teachers staff members. It is clear however that a Board of Education is bound by its own rules and regulations. See Applegate v. Freehold Regional High School District Board of Education, 1969 S.L.D. 56 and Shifrinson v. Marlboro Board of Education, OAL DKT. NO. 6363-83 (April 19, 1984), aff'd Comm. of Education (June 4, 1980).

In the instant matter the petitioner was not given written notice that his increment would be withheld until approximately five hours prior to the meeting of the Board of Education nor was he accorded an opportunity to discuss the proposed recommendation with the Director of Secondary Education.

It is abundantly evident that the respondent, Board of Education, failed to follow both the letter and spirit of the State Board of Education regulations as well as its own regulations in evaluating the petitioner in its decision to withhold the salary increment. In viewing the totality of the actions of the Board of Education as well as the conduct of the Director of Secondary Education in preparing his "performance evaluation" I **CONCLUDE** the Board of Education action on June 26, 1985, in denying the petitioner an increment was arbitrary, capricious and unreasonable.

2. The Open Public Meeting Violation

There is no dispute that the City of Clifton Board of Education is a public body within the definition in N.J.S.A. 10:4-8a and subject to the provisions of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.

The Open Public Meetings Act requires that all discussions or actions conducted by a public body be open to the public except where otherwise provided. N.J.S.A. 10:4-12 states:

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> b. A public body may exclude the public only from that portion of a meeting at which the public body discusses . . . .
>
> 8. Any matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any specific prospective public officer or employee or current public officer or employee employed or appointed by the public body, unless all the individual employees or appointees whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Accordingly, petitioner has a statutory right to request that the discussion of his employment be held in public.

However, in order to exercise this right, he must be informed when and where the discussion by the public body will take place. In Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64, 66 (App. Div. 1977), the Appellate Division held that:

> Plain implication of the personnel exception to the Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory reight and request a public hearing if they have reasonable advance notice so as to enable them to make a decision on whether they desire a public discussion, and to prepare and present an appropriate request in writing.

In accord see Oliveri v. Carlstadt-East Rutherford Regional Board of Education, 160 N.J. Super. 131 (App. Div. 1978) and Woodside v. Board of Education of the City of Bayonne, decided Commissioner (November 19, 1984), aff'd with modifications St Board of Education (April 3, 1985):

In Woodside, the State Board of Education held that:

> The State Board emphasizes that, pursuant to N.J.S.A. 12(b)(8), an employee who is subject to a board's ac withhold his increment has a right to discussion of th

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> at a public meeting if he requests such discussion in writing. Thus, although N.J.S.A. 18A:29-14 does not require prior notice of a board's action to withhold an increment, we conclude that the affected employee must be given sufficient notice to afford him the opportunity to exercise his right to public discussion under N.J.S.A. 10:4-12(b)(8). [emphasis supplied]

In Woodside, the State Board of Education determined that the petitioner had adequate notice when he was informed by letter dated June 28, 1983, that the Board of Education would act on July 19, 1983. In the instant matter, petitioner clearly did not have sufficient notice to make a rational determination if he wished to exercise his right to a public discussion of the Board of Education's decision to withhold his annual increment.

Petitioner was consequently not afforded "adequate notice" of respondent's meeting of June 26, 1985, in which his salary increment was to be withheld. The failure of respondent to adequately notify petitioner is violative of the Open Public Meetings Act.

Accordingly I **CONCLUDE** that the respondent's action on June 26, 1985, in withholding petitioner's salary increment was void.

For the reasons heretofore stated, it is hereby **ORDERED** that the action of the Board of Education in denying the petitioner's salary increment for the 1985-86 school year is reversed. The respondent is **ORDERED** to retroactively place the petitioner on the step of the professional salary guide he would be on but for its action on June 26, 1985.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 7-1986
DATE

TIMOTHY N. TUTTLE, ALJ

Receipt Acknowledged:

MAR 10 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 11 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EDWARD BUZINKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is observed that the Board has filed exceptions to the initial decision pursuant to the applicable provisions of N.J.A.C. 1:1-16.4 a, b and c.

The Board's arguments advanced by way of its exceptions are summarized below.

1. The ALJ erred both factually and legally in finding that there were procedural irregularities sufficient to warrant the reversal of the salary and adjustment increments withheld from petitioner.

2. The Board was in complete compliance with the Open Public Meetings Act when it determined to withhold petitioner's salary and adjustment increments for the 1985-86 school year.

3. The Board's action was not arbitrary or capricious.

In arguing its first point (Point I) in its exceptions, the Board contends that the ALJ completely ignored the testimony of the Director of Secondary Education as well as the facts which were stipulated by the parties in the record of this matter. The Board asserts that it has been stipulated in the record that the director met with petitioner on June 21, 1985 to go over his annual evaluation report with him and that petitioner was advised at that time that the director was contemplating recommending to the Board at its June 28, 1985 meeting the withholding of petitioner's increment for the 1985-86 school year. This action taken by the director was consistent with the Board's policies which hold in part that no increase in salary "***is to be considered as automatic or mandatory***" (J-4) or that "[p]rior to any recommendation to the Board to withhold an increment,*** the employee shall be given an opportunity to discuss the proposed recommendation with his/her supervisor***." (emphasis supplied) (J-5)

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Consequently, the Board maintains that petitioner did indeed have an opportunity to discuss his evaluation with the Director of Secondary Education. Petitioner, however, failed to make any effort within the period from June 21 through June 26, 1985 to meet with the director to discuss his evaluation prior to the 8:00 p.m. Board meeting of June 26, 1985.

Given this set of undisputed facts, the Board maintains that petitioner had five days, and not five hours as found by the judge, to discuss his evaluations with the Director of Secondary Education. The Board further claims that the ALJ's reliance on its "General Administration Notice #8" (J-7) pertains to increment withholdings for teachers and not administrative personnel such as petitioner.

Moreover, the Board points out that Notice #8 (J-7) was never adopted as Board policy and cannot supersede the existing Board policies (J-4; J-5) pertaining to the withholding of increments. Additionally, the Board argues that Fitzpatrick v. Board of Education of Montvale, 1969 S.L.D. 4 sets forth the applicable standard by which its actions should be judged as agreed upon by the parties. In this regard the Board claims that the due process procedures in Fitzpatrick were complied with. More specifically the Board argues as follows in its exceptions:

> ***On June 21, 1985, the undisputed testimony showed that the Director of Secondary Education came to the petitioner's school to hand him the typed response to the petitioner's self evaluation and to inform the petitioner that his increment was in jeopardy. In fact, petitioner received the response on that date, and acknowledges that he was informed that the Director of Secondary Education might recommend withholding at the Board meeting of June 26. The Director wanted to review the evaluation at that time, but the petitioner stated that he was too busy.
>
> Thereupon, according to the credible testimony of Owen Engler, he invited the petitioner to come to see him later in the afternoon or at any time thereafter until June 26. It is undisputed that at no time between June 21 and June 26 did petitioner accept the offer to meet with the Director to meet with him and review either the response to the self evaluation or the Director's impending recommendation. Thus, it is clear that petitioner did in fact have notice of the dissatisfaction, notice of the impending recommendation, and an opportunity to discuss it with his superior (an opportunity not taken). The requirements of Fitzpatrick were fully met.

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> In this connection, petitioner places some emphasis on the fact that at the meeting of [J]une 21 it was stated as a "possibility" that a negative recommendation would occur, whereas on June 27 (sic) it was stated as a fact. Petitioner's position leads to a wholly illogical result; would he (or anyone) rather have the opportunity to discuss a decision on increment withholding before a decision has been made, or afterwards?
>
> The answer is that the best chance to influence a superior's decision is prior to that decision being made. Owen Engler testified that this is precisely why he delayed his final decision to the last minute. That petitioner did not avail himself of the opportunity was the responsibility of petitioner. The precepts of due process embodied in Fitzpatrick do not require that a conference between an employee and a supervisor actually take place prior to a recommendation for withholding - just that the opportunity be given. The mandate of Fitzpatrick was fully met.*** (Exceptions, at pp. 20-22)

In relying on Fitzpatrick the Board takes the position that these was no violation of N.J.A.C. 6:3-1.21(e)(4) inasmuch as petitioner was given an opportunity within the period, June 21 through June 26, 1985, to discuss his evaluation with his supervisor which he failed to do.

With regard to petitioner's claim that he was denied the opportunity to place performance data into the evaluation report within a 10-day period pursuant to N.J.A.C. 6:3-1.21(e)(5), the Board maintains that he had from June 21, 1985 through June 26, 1985, a period of 5 1/2 days to do so. The Board argues that the record clearly establishes that petitioner knew the Board would consider his increment on June 26, 1985.

Although the Board concedes that the provisions of N.J.A.C. 6:3-1.21(e)(5) allowed petitioner 10 days to supply such data, it argues that such strict adherence to the rule under the circumstances recited herein, exalts form over substance through a "hypertechnical error." In this regard the Board relies on the Appellate Court's admonition to the Commissioner in Martin v. Board of Education of Northern Highlands Regional High School District, 1979 S.L.D. 852, which states in pertinent part:

> ***We conclude that the Commissioner's distinction was hyper-technical and that the substance of the statutory requirement is satisfied when the school board acts by public recorded roll call vote prior to the commencement of the school year involved and the individual

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> is informed of the reasons for the action, whether before or after the public roll call vote.***

The second point (Point II) of the Board's exceptions relates to the ALJ finding that the Board violated the provisions of the Open Public Meetings Act in failing to give petitioner adequate notice of its meeting of June 26, 1985

While the Board agrees with the ALJ that Rice, supra, is controlling with respect to the provisions of "adequate notice," it argues that the ALJ has misinterpreted the specific language of the Court to that effect which reads in pertinent part:

> The plain implication of the personnel exception to the New Jersey Open Public Meetings Act is that if all employees whose rights could be adversely affected decide to request a public hearing, they can only exercise that statutory right and request a public hearing if they have reasonable advance notice so as to enable them to (1) make a decision on whether they desire a public discussion and (2) prepare and present an appropriate request in writing.
>
> (emphasis supplied.)
> (155 N.J. Super. at 73)

Hence it is the Board's position that a plain reading of the language of the Court in Rice, when applied to the facts of this matter, establishes that petitioner was advised by the Director of Secondary Education on June 21, 1985 that his rights could be adversely affected through Board action on June 26, 1985. This action occurred approximately 5 1/2 days before the Board meeting and has been stipulated in the record by the parties. (See Stipulation No. 6, Initial Decision, ante.)

Point III of the Board's exceptions to the initial decision is that its action complained of herein was not arbitrary or capricious. It is pointed out in the footnote (#21) to the Board's exception on page 32 that the ALJ made such a finding notwithstanding the fact that petitioner never argued this pretrial issue on the merits at the hearing.

The Board argues, further, that its decision to withhold petitioner's salary increment was not taken lightly, but only after it had been adequately documented by his superiors that he failed to provide the necessary leadership in his school during the 1984-85 school year which was manifested in part by problems in the classroom and through his failure to produce written classroom observations of his teaching staff as required.

In this regard the Board relies on the standard set by the Court in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960) which states that increment withholdings by

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local boards of education are presumed to be correct and that absent a showing that such actions were arbitrary, capricious or unreasonable, the Commissioner will not substitute his judgment.

Therefore, the Board urges the Commissioner to reverse the recommended findings and conclusions of the ALJ in this matter.

In the Commissioner's judgment all of the evidence, including the facts stipulated by the parties appearing in the initial decision, ante, as well as petitioner's testimony appearing on the transcript of January 27, 1986 on pages 87 through 90, support the Board's contention that as of June 21, 1985 petitioner was sufficiently informed and aware of the fact that his supervisor was not satisfied with his performance. This information was related verbally to petitioner by his supervisor on June 21, 1985 and set forth fully in his supervisor's written responses in petitioner's "Administrator Confidential Evaluation" report (J-9) received by petitioner on the same day.

Additionally, petitioner's supervisor advised him on June 21, 1985 that he was contemplating recommending the withholding of petitioner's salary increment to the Board at its meeting of June 26, 1985.

It is further stipulated that petitioner had prior knowledge that the Board meeting of June 26, 1985 was scheduled to consider the awarding of salary increments to all teaching staff members including himself.

While it is true that petitioner did not receive written notification (J-1) regarding the supervisor's recommendation and reasons for the withholding of his increment until June 26, 1985, nevertheless the Commissioner finds and determines that petitioner knew of his supervisor's dissatisfaction with his performance on June 21, 1985.

Moreover, petitioner was in possession of and fully knowledgeable of the Board policies affecting increment eligibility (J-4) and the withholding of increments (J-5) since 1980.

For the Commissioner to hold that the Board violated its own policies with regard to increment withholding by failing to give petitioner adequate notice or opportunity to meet with his supervisor to discuss the recommendation to withhold his salary increment, or request that the Board discuss this matter in public, is without merit and exalts form over substance. Petitioner had five days to meet with his supervisor (June 21, 1985 through June 26, 1985) in order to exercise his rights pursuant to Board policy. (J-5) In fact he was urged by his supervisor on June 24, 1985, to meet with him for that purpose. However, petitioner declined to do so.

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It is precisely this five-day period (June 21 through June 26, 1985) afforded to petitioner which overcomes his claim that the Board violated the Open Public Meetings Act on the grounds that he had insufficient notice of the meeting for the purposes of deciding whether to have this matter discussed publicly and for sufficient time to file a rebuttal. This determination is consistent with both the Board's policy (J-5) on increment withholding, the Commissioner's decision in Fitzpatrick, supra, and the mandate of the Appellate Court in Rice, supra.

The Commissioner does, however, concur with the findings and conclusions reached by the ALJ that the Board through its Director of Secondary Education seriously violated the specific provisions of N.J.A.C. 6:3-1.21(e) and (f), ante, in preparing petitioner's annual evaluation (J-9) of the 1984-85 school year. A review of this document fails to indicate that the following procedures were implemented in accordance with the above-cited regulations:

1. That the 1984-85 annual summary conference was held between petitioner and his supervisor before the written performance report was filed. (N.J.A.C. 6:3-1.21(e))

2. That a review was conducted of petitioner's progress toward the objectives of the individual professional improvement plan (PIP) developed at the previous (1983-84) annual conference. (N.J.A.C. 6:3-1.21(e)2)

3. That a review and signing of the annual written performance report for the 1984-85 school year was conducted within 5 working days of the review.

The Commissioner observes that even assuming such review was conducted on June 21, 1985, the 5 working day provision would extend beyond June 26, 1985 inasmuch as there was an intervening weekend.

Even though petitioner filed a rebuttal to his annual evaluation with the Board on July 1, 1985, he was not required to do so for the purpose of complying with the provisions of N.J.A.C. 6:3-1.21(e) et seq. because all of the above prerequisites to his annual evaluation for 1984-85 were not implemented by his supervisor.

The Commissioner therefore finds and determines that the Board could not have made its decision to withhold petitioner's salary increment solely on the basis of his annual evaluation (J-9) inasmuch as it was procedurally defective and fatally flawed.

The Board, however, could have made an independent determination regarding the withholding of petitioner's increment notwithstanding the violations cited in N.J.A.C. 6:3-1.21(e) et seq. The record of this matter fails to reveal whether the Board did, in fact, review other reports or discussed petitioner's performance with his superiors at its meeting of June 26, 1985.

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Therefore the Commissioner finds and determines that it is necessary to remand this matter to the Office of Administrative Law for a limited hearing in order to establish whether the Board had any basis, other than petitioner's annual evaluation, upon which to make an independent determination to withhold petitioner's salary increment.

In summary, the Commissioner reverses the ALJ findings and determination which held the Board violated its own policy and the Open Public Meetings Act when it determined to withhold petitioner's 1985-86 salary increment at its meeting of June 26, 1985.

The Commissioner affirms the ALJ's findings that petitioner's annual evaluation for the 1984-85 school year which was prepared by his supervisor seriously violated the provisions of N.J.A.C. 6:3-1.21(e) et seq. and therefore could not be relied upon by the Board as the basis for withholding his salary increment.

Accordingly, for the reasons set forth above, this matter is hereby remanded to the Office of Administrative Law for a limited hearing to determine whether or not the Board had considered other information at its meeting of June 26, 1985, which would have permitted it to make an independent determination to withhold petitioner's salary increment.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 24, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 2899-86
(EDU 5700-85 - remanded)

AGENCY DKT. NO. 271-8/85

EDWARD BUZINKY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON,
Respondent.

Wayne J. Oppito, Esq., for petitioner

Patrick C. English, Esq., for respondent
(Dines & English, attorneys)

Record Closed: July 23, 1986 Decided: September 4, 1986

BEFORE **KEN R. SPRINGER, ALJ:**

Statement of the Case

This is an appeal from a resolution of the Clifton Board of Education ("Board") withholding petitioner's salary increment for the 1985-86 school year. Previously, the Office of Administrative Law ("OAL") had issued an initial decision under Docket Number EDU 5700-85 invalidating the Board's action. By order entered on April 24, 1986, the Commissioner of Education remanded the matter to the OAL for additional proofs. Specifically, the Commissioner called "for a limited hearing in order to establish

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whether the Board had any basis, other than the petitioner's annual evaluation, upon which to make an independent determination to withhold petitioner's salary increment." (slip op. at p. 24).

Procedural History

On June 26, 1985, the Board voted to withhold the salary increment of petitioner Edward Buzinky for 1985-86. Buzinky filed an appeal with the Commissioner of Education on August 7, 1985. Thereafter, on September 10, 1985, the Commissioner transmitted the matter to the OAL for hearing as a contested case. The OAL held hearings on January 27, 30 and 31, 1986. As a result, on March 7, 1986 the administrative law judge issued a recommended decision in which he determined that the Board had violated state regulations and its own policy. Further, he found that the Board had failed to comply with the notice requirements of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.

On agency review, the Commissioner of Education rejected the conclusion that the Board had violated either its own policy or the Open Public Meetings Act. However, the Commissioner agreed that annual evaluation of petitioner's job performance was "procedurally defective and fatally flawed." (slip op. at page 23). Consequently, on April 24, 1986, the Commissioner remanded the matter to the OAL for consideration of whether the Board had any independent basis on which to withhold petitioner's salary increment. Pursuant to these instructions, the OAL held a further hearing on July 8, 1986. Both parties submitted legal memoranda on July 23, 1986, on which date the record closed.

Summary of the Evidence

Since deliberations concerning the increment withholding were conducted in executive session, the only persons with direct knowledge of the events are Board witnesses. According to the official minutes, the session on June 26, 1985 started at 8:50 p.m. and ended at 10:00 p.m. Most of the session was devoted to a discussion of Buzinky's performance as principal of Woodrow Wilson Junior High School. The minutes reflect that

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the school administration reviewed the "evaluation of [the] past two years" for the benefit of Board members. (Exhibit J-47).

At the hearing on remand, the Board recalled two school administrators who had previously testified. Owen Engler, director of secondary education, had been responsible for observing Buzinky's performance in 1984-85. He prepared the written evaluation report which the Commissioner has ruled to be defective (Exhibit J-9). Engler appeared before the Board in executive session on June 26, 1985 and made an oral presentation. To the best of Engler's knowledge, Board members never received a copy of his written report or any other document relating to Buzinky's performance. Instead, the Board relied exclusively on Engler's verbal report and the question-and-answer period which followed. During the course of the meeting, Engler informed the Board of his dissatisfaction with Buzinky's performance in five areas: (1) scheduling problems for teachers and students; (2) an excessive number of complaints from parents; (3) unauthorized absences from the school building without adequate coverage in the event of a crisis; (4) Buzinky's failure to make personal observations of classroom teachers under his supervision; and (5) the lack of regularly scheduled faculty meetings. Significantly, Engler admitted that his oral presentation was merely a summary of the contents of his written evaluation report. In Engler's own words, he "didn't present anything to the Board which was not in [the written report.]" His testimony on this point is consistent with the notice which Engler delivered to Buzinky on the afternoon prior to the Board meeting. That notice indicates that the reasons for the recommendation to withhold Buzinky's increment are "those outlined in your evaluation." (Exhibit J-1).

William Liess, who was formerly assistant superintendent and is now acting superintendent of schools, corroborated Engler's version of what occurred at the private session. Although Liess did not work on the written evaluation of Buzinky, he attended the Board meeting and voiced opposition to the award of a salary increment. Before reading the written evaluation, Liess had independently formed his opinion of Buzinky's weaknesses on the basis of his "own observations and comments by others." As Liess explained, his main objection was Buzinky's "lack of leadership" and his inability to project a "commanding presence in the school." Nothing said by Liess at the executive session

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was different from what was already stated in the written evaluation, which was critical of Buzinky for failure to provide "strong, fair leadership." At no time prior to June 26, 1985 did Liess ever communicate to Buzinky the need for any improvement in leadership style.

Ultimately, the Board voted to withhold Buzinky's salary increment, "for reasons of good cause." (Exhibit J-48).

Findings of Fact

After review of the evidence, I FIND that the Board lacked sufficient basis, apart from the annual evaluation report, for withholding petitioner's salary increment.

Testimony of the Board's own witnesses establishes that Engler's oral presentation on June 26, 1985 consisted of a recitation of information derived from his prior written evaluation. By his own admission, Engler did not inform the Board of any new facts which were not already in the defective report. While Board members may not have seen the actual report itself, they relied on Engler's summary of its contents and did not consider any additional facts. Liess' participation at the meeting added little to the available information on which the Board reached its decision. Unlike Engler, Liess did not have direct supervisory responsibility for evaluating Buzinky's job performance. Except for vague generalizations about the poor quality of Buzinky's leadership, Liess did not contribute any useful information about Buzinky's supposed administrative deficiencies. Nor did Liess refer to any specific incidents or problems beyond those covered in Engler's evaluation.

Conclusions of Law

Based on the foregoing facts and the applicable law, I CONCLUDE that the Board's supplemental proofs do not provide independent support for its decision to withhold petitioner's salary increment.

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A teaching staff member's entitlement to a salary increase is not an automatic right, but rather is "in the nature of a reward for meritorious service." North Plainfield Educ. Ass'n v. North Plainfield Bd. of Educ., 96 N.J. 587, 593 (1984). Evaluation of a staff member's performance is "a managerial prerogative essential to the discharge of the duties of a school board." Ibid. Generally, a school board's exercise of its discretion will not be upset "unless patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Bd. of Educ., 60 N.J. Super. 288, 294 (App. Div. 1960). Recognizing a school board's broad powers in this area, the Commissioner of Education has nonetheless held that an employee has a basic due process "right to know if and when his superiors are less than satisfied with his performance and the basis for such judgment." Fitzpatrick v. Montvale Bd. of Educ., 1969 S.L.D. 4, 7 (Comm'r of Educ. 1969).

Here the Commissioner previously found the defective evaluation to be an inadequate basis for denial of petitioner's increment. The Commissioner remanded the matter for clarification on the narrow issue of whether the Board had considered other information which might justify the result reached by it. This question must be answered in the negative. Without the defective evaluation, there was insufficient information before the Board to sustain the withholding of petitioner's salary increment.

Order

It is **ORDERED** that the Board restore petitioner's 1985-86 salary increment.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

Sept. 4, 1986
DATE

Ken R. Springer
KEN R. SPRINGER, ALJ

SEP 8 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

SEP 9 1986
DATE

Ronald L. Parker
FOR OFFICE OF ADMINISTRATIVE LAW

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Appendix

List of Witnesses

1. William Liess, acting superintendent of schools
2. Owen Engler, director of secondary education
3. Edward Buzinky, elementary school principal

List of Exhibits

No.	Description
J-47	Copy of the minutes of the executive session of the Clifton Board of Education held on June 26, 1985
J-48	Copy of a resolution adopted by the Clifton Board of Education on June 26, 1985

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EDWARD BUZINKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered on remand by the Office of Administrative Law.

It is observed that the Board's exceptions to the initial decision and petitioner's reply to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In order to establish the basis upon which the matter is now before the Commissioner for final disposition, it is necessary to summarize the earlier proceedings which required this matter to be remanded to the Office of Administrative Law.

Petitioner, tenured principal whose salary increment was withheld for the 1985-86 school year, alleged the Board's action was taken in violation of the Open Public Meetings Act (OPMA) and, further, that the Board's denial of his increment was arbitrary.

The ALJ found that petitioner was not given adequate notice of the June 26, 1985 Board meeting at which time his increment was to be withheld and was not afforded adequate time to determine whether to request public discussion. Because of the OPMA violation, the ALJ found the Board's action was void and directed that petitioner be placed on the appropriate salary step.

The Commissioner held that petitioner was adequately informed that his supervisor intended to recommend withholding of the increment based upon the June 21st evaluation report. The Commissioner concurred with the ALJ's finding that there were violations of prescribed evaluation procedures. Therefore, the matter was remanded for a limited hearing to determine whether the Board had any basis other than the fatally flawed annual evaluation report upon which to consider withholding petitioner's increment.

On remand to the Office of Administrative Law, a limited hearing pursuant to the Commissioner's directive was conducted by the ALJ on July 8, 1986.

In the initial decision the ALJ made the following findings of fact:

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> After review of the evidence, I FIND that the Board lacked sufficient basis, apart from the annual evaluation report, for withholding petitioner's salary increment.
>
> Testimony of the Board's own witnesses establishes that Engler's oral presentation on June 26, 1985 consisted of a recitation of information derived from his prior written evaluation. By his own admission, Engler did not inform the Board of any new facts which were not already in the defective report. While Board members may not have seen the actual report itself, they relied on Engler's summary of its contents and did not consider any additional facts. Liess' participation at the meeting added little to the available information on which the Board reached its decision. Unlike Engler, Liess did not have direct supervisory responsibility for evaluating Buzinky's job performance. Except for vague generalizations about the poor quality of Buzinky's leadership, Liess did not contribute any useful information about Buzinky's supposed administrative deficiencies. Nor did Liess refer to any specific incidents or problems beyond those covered in Engler's evaluation.
>
> (Initial Decision, ante)

The Board maintains that the ALJ's findings and conclusions in the initial decision on remand are erroneous. Petitioner's unsatisfactory performance predated his evaluation (J-9), notwithstanding the fact that the same material was covered in both his written evaluation and the discussion among the Board, the Director of Secondary Education and the Acting Superintendent at the Board meeting of June 26, 1985.

More specifically, the Board argues the following in its exceptions:

> As the testimony showed, the Board relied exclusively upon verbal presentations by Mr. Buzinky's superiors Owen Engler and William Liess and not at all upon the flawed evaluation instrument. There is no testimony that they even received, much less considered, the evaluation instrument.
>
> Owen Engler testified frankly that the areas covered by his verbal report to the Board were the same areas which he had noted in his rebuttal to Mr. Buzinky's self evaluation. However, he also testified that these were the same areas of criticism which he had developed well prior to responding to Mr. Buzinky's self evaluation on the evaluation instrument, J-9. Even a brief review of the many memoranda marked into evidence

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> at the January hearings (see, e.g., J.13-J.46) shows this to be true, for these memoranda predate the response to the evaluation instrument.
>
> Hence, the Board did consider information other than from the evaluation instrument found by the Commissioners (sic) to be flawed. It was on the basis of this other information that the Board acted.
>
> The Administrative Law Judge erred in concluding that because the same material was covered in both the flawed written evaluation and in the verbal presentations to the Board "there was insufficient information before the Board to sustain the withholding of petitioner's salary increment". The Commissioner found the evaluation instrument in question flawed on a totally procedural basis. He specifically did not hold that the information contained therein was insufficient to form a basis for the withholding of petitioner's increment. Indeed, the implication is to the contrary since the Commissioner remanded for the purpose of determining whether the Board received information from any source other than the flawed evaluation instrument itself, and specifically whether it "discussed petitioner's performance with his superiors at its meeting of June 26, 198[5]". Slip opinion at 24. (emphasis in text)
>
> (Board's Exceptions, at pp. 9-10)

Moreover, the Board argues that its actions with respect to the withholding of petitioner's salary increment for the 1985-86 school year was not taken lightly but, rather, after considerable deliberation and review of his less than satisfactory performance, which is supported by the testimony at the hearings conducted in this matter and the joint exhibits placed in evidence into the record of this matter.

The Board maintains that its action to withhold petitioner's salary increment for the 1985-86 school year was not arbitrary, capricious or unreasonable and bears a presumption of correctness in accordance with the standards laid down by the Court in Kopera v. West Orange Board of Education, 60 N.J. Super. 288 (App. Div. 1960).

Petitioner initially argues that the Board's exceptions to the initial decision on remand are untimely pursuant to N.J.A.C. 1:1-16.4a which requires that such exceptions be filed with the agency head within 10 days of the receipt of the initial decision by the Board. Petitioner claims that the Board received the initial decision on September 10, 1986 which would therefore require that its exceptions be filed with the Commissioner no later than September 20, 1986, instead of September 22, 1986, the date of actual filing.

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Petitioner also relies on the ALJ's "Findings of Fact" and the written notifications he received from the Director of Secondary Education (J-1) and the School Business Administrator (J-2) regarding the reasons for withholding his salary increment for the 1985-86 school year. Petitioner submits that the "reasons" are those contained in his annual evaluation (J-9) which the Commissioner had previously determined to be "procedurally defective and fatally flawed" (Slip Opinion, at p. 23, decided April 24, 1986). Consequently, petitioner urges the Commissioner to affirm the initial decision and to direct the Board to restore his 1985-86 salary increment retroactive to July 1, 1985, with all benefits and emoluments owing and due to him.

In the Commissioner's judgment, the record of the hearing on remand conducted by the ALJ on July 8, 1986, supports the ALJ's finding that the Board did not review the annual evaluation (J-9) of petitioner's performance in determining to withhold his salary increment for the 1985-86 school year. Instead, the Board engaged in a lengthy discussion with the Acting Superintendent and the Director of Secondary Education regarding their assessments of petitioner's performance for the period of time in question. According to the testimony of the Director of Secondary Education on cross-examination he verbally summarized the information contained in petitioner's annual evaluation (J-9) in providing the Board with information as to why petitioner's salary increment should be withheld for the 1985-86 school year.

In his earlier decision of this matter the Commissioner held that the annual evaluation itself was procedurally flawed to the extent that it could not be relied upon as the basis for withholding petitioner's salary increment. Therefore, on remand he directed that a limited hearing be conducted in order to determine whether or not the Board had considered other information independent of the annual evaluation (J-9) which constituted good and sufficient reason for withholding petitioner's salary increment.

More specifically, the Commissioner determined that he would not consider any information related to those written responses contained in the annual evaluation (J-9) which constituted replies to petitioner's written self assessment. The Commissioner does find, however, that there is sufficient information in the record existing in other forms pertaining to his unsatisfactory performance of which he had been previously made aware by his superiors.

This information is deemed to be relevant insofar as it is considered to be supportive of those reasons communicated verbally to the Board by the Director of Secondary Education on June 26, 1985. This is so notwithstanding that a considerable portion of the same information also exists in the controverted annual evaluation (J-9) of petitioner previously determined to be defective by the Commissioner in these proceedings.

In support of this finding, the Commissioner relies on the testimony of the Director of Secondary Education at the hearing of

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July 8, 1986, as well as certain of those exhibits admitted as evidence in the record of this matter.

At the hearing on remand conducted on July 8, 1986, the Director of Secondary Education testified that he had five major areas of concern regarding petitioner's performance during the 1984-85 school year:

1. Lack of dynamic leadership (Tr. 28)

2. Schedule of teachers, students prior to the opening of school (Tr. 29)

3. Improper disposition of parent complaints (Tr. 29)

4. Petitioner absenting himself from school on a number of occasions during the school day without notifying the central office (Tr. 30)

5. Completing teacher evaluations without having personally conducted teacher observations (Tr. 30)

6. Failure to conduct one faculty meeting per month during the school year. (Tr. 30)

The Director of Secondary Education testified that he verbally communicated to the Board on June 26, 1985 his concerns regarding petitioner's performance. (Tr. 35)

One of the primary concerns verbally communicated to the Board by the Director of Secondary Education with regard to petitioner's unsatisfactory performance was the fact that he failed to follow an administrative policy (J-7) which reads in pertinent part as follows:

> All non-tenured secondary school personnel shall be jointly evaluated by the building Principal, Director of Secondary Education and the appropriate Coordinator, including a total of at least two of five classroom observations by the Principal and Director of Secondary Education. (emphasis in text) (J-7, at p. 4)

Although petitioner's Professional Improvement Plan (PIP) (C-1) was appended to his annual evaluation for the 1984-85 school year, it is evident that such plan was prepared by the Director of Secondary Education and reviewed with petitioner on May 7, 1985 as evidenced by the dated signatures of both parties. This exhibit existed with petitioner's knowledge prior to the time it was made part of the defective annual evaluation. (J-9)

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It is specifically noted that petitioner was directed to "Improve Teacher Instruction" by "continued and careful observation and teacher conferences." (C-1)

The same directive appears on the PIP attached to petitioner's annual evaluation (J-12) for the prior 1983-84 school year. Moreover, according to petitioner's own testimony on cross-examination at the hearing conducted on January 27, 1986, he responded to questioning by Board counsel as follows:

Q. Did you ever ask Mr. Engler if he would waive your responsibility to do a written observation?

A. No, sir.

Q. Did you ever ask Mr. Liess?

A. No.

Q. Did you ever ask Mr. Liess -- he's the assistant superintendent; right?

A. Uh-huh.

Q. And did you ever ask the superintendent?

A. No.

Q. Now, no one gave you permission to fail to do the written observations?

A. No, sir.

Q. Now, you had how many non-tenure teachers in Woodrow Wilson during the 1984-1985 school year?

A. I don't recall, to be honest with you. I don't have that information with me.

Q. Well, Robert Dominianni was a non-tenure teacher, was he not?

A. I don't know that off the top of my head. I believe he was then.

Q. How about Irene Falcone?

A. Yes.

Q. John Jankowski?

A. Yes.

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Q. Terry Maury?

A. Yes.

Q. Kathleen Bruno?

A. Last year?

Q. Yes.

A. I don't know if she was. I don't recall.

Q. Nancy Grenell?

A. Nancy Grenell, yes.

Q. Nancy Schumacher?

A. Yes.

Q. You didn't prepare any written observations on any of them, did you?

A. I believe on Irene Falcone. Mr. Liess called me one day and asked me to do one and I did.

"Q. Now, can you tell us why for the entire 1984-1985 school year only three observations done by you on your entire staff have been found if no one ever required you to do observations? Do you have any information which would contradict that?

A. Other than the observations I told you that I did.
(Transcript Jan. 27, 1986, at pp. 80-81, 83)

The above finding by the Commissioner that petitioner did not comply with the administrative policy (J-7) to observe nontenured teachers was but one of the concerns verbally communicated by the Director of Secondary Education to the Board on June 26, 1985. This information did, in fact, exist in a form other than as summarized in petitioner's annual evaluation (J-9) for the 1984-85 school year.

Having so determined that the Board on this basis alone had sufficient information to withhold petitioner's salary increment for the 1984-85 school year, the Commissioner shall not remand this matter again to the Office of Administrative Law for any further findings of fact pertaining to any additional reasons which may have been considered by the Board for withholding petitioner's salary increment.

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Finally, the Commissioner cannot agree with petitioner's claim that the Board's exceptions to the initial decision herein are untimely filed.

The record establishes that the final day for the Board to file its exceptions to the initial decision was September 20, 1986, which was a Saturday. The Commissioner has consistently held that when the last date for filing exceptions falls on a non-working day, such exceptions will be considered timely provided they are filed with him on the next scheduled agency work day.

Accordingly, the Commissioner hereby finds and determines that the Board's action of June 26, 1985 to withhold petitioner's salary increment was not arbitrary, capricious or without just cause.

In so finding, the Commissioner hereby reverses the initial decision on remand in this matter and hereby dismisses the instant Petition of Appeal.

COMMISSIONER OF EDUCATION

October 20, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 5474-85

AGENCY DKT. NO. 294-8/85

ANNE MAIORINO,

Petitioner,

v.

BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL-TECHNICAL SCHOOL, BURLINGTON COUNTY,

Respondent.

Douglas B. Lang, Esq., for the petitioner (Katzenbach, Gildea & Rudner, attorneys)

John E. Queenan, Jr., Esq., for the respondent

Record Closed: January 29, 1986 Decided: March 10, 1986

BEFORE **AUGUST E. THOMAS,** ALJ:

Anne Maiorino (petitioner) is a teacher employed by the Board of Education of the Burlington County Vocational-Technical School (Board) who was not reinstated to her position as a head teacher. She filed a petition of appeal with the Commissioner of Education seeking reinstatement to that position which she asserts was denied her based on illegal discrimination because of her age. The Board denies that it discriminated against petitioner, or that its action is improper.

The Commissioner transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted on October 21, 1985, in the Office of Administrative Law, Mercerville. A

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hearing was conducted on December 16, 1985, in the Westhampton Township Municipal Building, Westhampton.

Petitioner filed a letter brief on January 8, 1986, setting forth her proposed findings of facts and conclusions of law. The Board filed its post-hearing letter brief on January 29, 1986. Petitioner's letter reply brief was also filed on January 29, 1986, at which time the record in this matter was closed.

PROCEDURAL BACKGROUND

Petitioner is properly certificated as a teacher of cosmetology and has been employed by the Board for 20 years. For the last 18 years she also held a position as the head teacher of Cluster IV. Five teachers comprise Cluster IV. Its vocations include commercial baking, commercial foods and cosmetology. The head teacher position has a job description (see, Head Teacher/Department Head, P-7), and petitioner was paid a stipend of about $800 in addition to her teacher's salary to perform those extra duties. The head teacher position requires annual appointment by the Board on the recommendation of the superintendent. The position carries no tenure. In September 1984, petitioner slipped and fell in the school parking lot, breaking her arm. She remained out of school until January 2, 1985, when she resumed her teaching and head teacher duties.

Petitioner asserts that her school principal told her on May 22, 1985, that he'd not recommend to the superintendent that she be reappointed to the position of head teacher, Cluster IV for the 1985-86 school year. Petitioner replied that she "was stunned" and that she had done a good job. She called the superintendent to protest. He could not see her at that time; however, he arranged a meeting and told petitioner to write all of her complaints (P-4). They met during the third week in June. In the meantime, the Board met on May 28 and voted to hire Anna Cacciatore, a first-year teacher, as head teacher of Cluster IV for the 1985-86 school year. The events leading to this Board appointment are set forth as follows.

DISCUSSION

Petitioner's performance as a head teacher and her annual reappointment were rather routine for 18 years. In fact, her principal, now in his third year, had recommended

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her reappointment to that position for the last two years. However, a personality conflict between them began to develop on May 16, 1985, when petitioner sent a sharply worded note of complaint to her principal about his office's failure to disseminate a pupil list as she had requested. In preparation for a field trip on April 22, 1985, with 57 of her pupils, petitioner prepared a list of their names to be published in the teachers' Busy Beaver, a daily school newspaper. She asked that the list be published Thursday, Friday and Monday, April 18, 19, and 22, respectively, so that teachers who might be absent on one particular day would be sure to see it. The list would serve as an excuse for pupils' absences from other teachers' classes. The list was not published on April 19 because of clerical error in the principal's office. Petitioner notified the office and the list was published on April 19. For some unexplained reason it was not published on April 22.

As a result of these omissions, or for other reasons, some teachers did not see the list and demanded excuses from pupils who were absent from their classes on April 22. The pupils descended on petitioner for written excuses. Petitioner then wrote the May 16, 1985 note to her principal complaining about his office's failure to publish the list and her subsequent responsibility to write excuse notes for her pupils. She concluded, "I have too many students to put up with this nonsense" (P-9 attachment). The principal replied in kind with a sharply worded memorandum and criticized petitioner for calling her service to pupils, "nonsense" (P-9).

On May 20, the principal called petitioner to his office and told her he wanted to replace her as the head teacher next year because he "wanted some young blood in there." The principal prepared a memorandum of their meeting on the same day (P-3). Petitioner insisted that this meeting took place on May 22, and about a week later she memorialized its substance in a memorandum to the superintendent (P-4).[1] That memorandum included her quotation by the principal (above) and it also related two incidents from the previous school year which she believed to be harrassment by her school principal (P-4). Later, petitioner met with the superintendent to discuss the frustrations expressed in her memorandum. Petitioner told the superintendent that "Adolph Hitler's son is alive and well at the vocational-technical school." The superintendent listened to her complaints; nevertheless, he advised her that the principal had the

[1]Although the litigants vigorously asserted that the meeting occurred on the date each specified, I was unable to draw any conclusion as to which was correct. In any event, I believe the exact date is unimportant.

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discretion to appoint his head teachers. At hearing, petitioner said she did not mean what she had stated (re: "Hitler") and that she had been very upset.

The head teacher and department head duties are basically the same (P-7). As a head teacher, petitioner took notes of their meetings and prepared them for her cluster teachers. At budget time she collected requests and ordered materials and supplies. Petitioner attended only two of the four scheduled head teacher meetings in the 1984-85 school year. She attended the September meeting before she broke her arm. She was out until January 1985, then missed the April meeting because of her field trip. Petitioner attended the June meeting even though she was not reappointed as head teacher "because I was being paid as a head teacher."

Petitioner testified that she had never been advised that her performance was unsatisfactory and that her only evaluation by the principal was conducted on the last day of school in June 1985 (P-8). Prior to May 20, 1985, petitioner never had a meeting with her principal to discuss her performance.

Under cross-examination, petitioner was reminded that she included in her memorandum to the superintendent (P-4) a reference to "new blood" as well as "young blood." Nevertheless, she insisted that the principal had said he wanted "young blood" and that Anna Cacciatore was much younger than she. Responding to my questions, the principal estimated petitioner's age between 50 and 60. He estimated Ms. Cacciatore's age between 35 and 45.

Given the above, which I determine to be the **FACTS** in this matter, I **CONCLUDED** at hearing that petitioner had established a prima facie case of age discrimination. I **DENIED** her request for a directed verdict and **ORDERED** the Board to go forward with its case. See, Andersen v. Exxon Co., 89 N.J. 483, 493 (1982).

The principal testified. He said that he had experienced problems in the foods area, and had problems with the lesson plans of B.,[2] a Cluster IV teacher. The major thrust of Cluster IV was in the foods area. Petitioner was in cosmetology. The principal determined that Cluster IV could be better served by the foods teacher, Anna Cacciatore. He called petitioner to his office on May 20 to discuss this change.

[2]The teacher's name is in the record, but does not need repeating in this decision. His increment has been withheld.

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The principal denied saying that he wanted "young blood" as the head teacher. He insisted that the program needed "new direction" in the foods areas and resolution of the problems he had with teacher planning. He said that petitioner was responsible to see that teachers made their lesson plans and that she had not performed that duty.

Petitioner accused the principal of developing a close personal relationship with Ms. Cacciatore. He responded that their only social contact was a picnic in his backyard for both of their families on one day in 1985. Additionally, Ms. Cacciatore's classes had brought him freshly baked "goodies" in school on occasion as she has done for others, including the Board.

The principal testified that he had issued a request sheet to all staff members on March 1, 1985, seeking their interest in head teacher and other leadership positions and that Ms. Cacciatore had expressed her interest in the Cluster IV head teacher position. The principal was directed to produce these request sheets after the lunch break.

After lunch the request sheets were examined and they revealed that only the petitioner had requested the head teacher position for the 1985-86 school year. Three of the teachers in the cluster made no requests and Anna Cacciatore's first request was to be advisor to the VICA club. Her second and final request was to participate as a faculty member to the National Honor Society (P-10 through P-14). Given these documents, the principal retracted his morning testimony regarding Ms. Cacciatore's request for the head teacher position.

The principal summarized his position, stating that Anna Cacciatore was very capable of performance as head teacher because she had worked in the coordination of the foods programs in the Mercer County Vocational-Technical Schools before her employment with this Board.

The principal criticized petitioner for failing to prepare and send to him minutes of head teacher meetings. He also said that teacher B. had prepared no lesson plans for months in the previous school year and that he had not been notified. The principal conceded that he had not advised petitioner of any problems before he advised

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her that she would not be reappointed. He also stated that he believes that a personality conflict developed after their May 20, 1985 meeting and that prior to that day he had not decided that he would not reappoint her.

On rebuttal, petitioner testified that she was responsible for receiving lesson plans and that teacher B. had delivered his plans promptly every Thursday. On the other hand, Ms. Cacciatore had not turned in her lesson plans until the last day of school. In petitioner's opinion it made no difference whether the head teacher was in foods or cosmetology. Petitioner denied that the principal ever mentioned a new direction of the program, stating "I never heard that before today."

Concerning the minutes of head teacher meetings, petitioner testified that she submitted the minutes of the September meeting to her principal. She did not submit others because she was out until January with her broken arm and missed the April meeting because of the field trip with her pupils. Petitioner did not submit minutes of the June meeting because she had been replaced as head teacher.

Based on the foregoing **FACTS**, the testimony and documentary evidence, several **CONCLUSIONS** may be reached.

1. Petitioner had 18 years of satisfactory service as a head teacher before she was advised that she would not be reappointed.

2. Prior to the May 20, 1985 meeting when she was so advised, petitioner had never been told that her performance was deficient in any way.

3. At that same meeting the principal told petitioner that he wanted "young blood" or "new blood" in the program.

4. Petitioner was replaced by a younger woman.

5. At hearing, the principal was critical of petitioner for not preparing minutes of the head teachers' meetings and sending them to him; however, the record does not reflect that he ever asked for these

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minutes during his three years as principal. And if he did ask, he never criticized petitioner for not submitting them. Further, I believe petitioner's testimony that she submitted minutes of the head teachers' September 1984 meeting because the principal never found it necessary to ask for those minutes. Petitioner had valid and understandable reasons for not handing in the other minutes: (a) broken arm, (b) field trip, and (c) her replacement by Anna Cacciatore.

6. The same conclusion is reached for petitioner not collecting lesson plans. Obviously, this did not cause any problems for the principal or else he would have become involved in the lesson planning in the prior three years. Nothing in the record suggests he ever asked about lesson plans and he was never critical of petitioner about collecting plans until the hearing.

7. Even if petitioner were deficient in performance by not preparing minutes and not collecting lesson plans, she was reappointed as head teacher by the principal at the end of his first and second years without critical comment to her.

8. Petitioner was not told that her alleged deficiencies led to the principal's decision not to reappoint her; rather, she was told that the program needed "new direction," according to his testimony. No specifics were given as to why a cosmetology teacher could not provide this new direction.

9. Petitioner's testimony that she "was stunned" when told that she would not be reappointed was very believable. She had held the position for 18 years without any critical comment until that May 20, 1985 meeting.

10. On that date and thereafter, a personality conflict existed between petitioner and the principal. Both acknowledged that at the hearing.

11. The principal's testimony concerning the request sheets was too convenient and misleading. His memory that Anna Cacciatore applied for the head teacher position was clear until he was faced with the facts

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that only petitioner had applied for the job. The principal then testified that he was "in error."

CONCLUSIONS OF LAW

No tenure attaches to the head teachers' positions and the principal is free to recommend whomever he wishes. Boney v. Bd. of Ed. of Pleasantville, 1971 S.L.D. 579. However, such a determination may not be based on any discriminatory reasons. Although allegations of discrimination are almost always denied and very difficult to prove, I am convinced by the totality of the events in this record that petitioner has proved her case.

There is more than sufficient evidence in the record to show that petitioner developed a prima facie case of discrimination. The Board was unable to establish any reasonable, rational, or educational basis for making a change in the head teacher assignment. That the program needed "new direction," without more, is hardly an educational rationale. Petitioner had performed her head teacher function successfully for 18 years without rebuke until she wrote her critical memorandum to the principal on May 16, 1985 (P-9, attachment). Whatever relationship existed between them prior to that date was changed for the worse, as both testified. And although petitioner met with the superintendent to plead her case, he obviously recommended to the Board, as advised by the principal, to appoint Anna Cacciatore, a first-year teacher, to the head teacher position that she never requested.

The principal's comments, whether "new blood," "young blood," or "new direction," in the context of the developed factual pattern, are sufficient for me to **CONCLUDE** that petitioner was not reappointed for the reason of age discrimination.

Employment discrimination due to age is barred by the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Similarly, the Age Discrimination Employment Act provides at 29 U.S.C.A. 623(a) that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's age. . .

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The Commissioner of Education has jurisdiction to entertain complaints charging acts of age discrimination involving teachers. Hinfey v. Matawan Regional Board of Education, 77 N.J. 514 (1978). See also, Miriam Kiss v. Dept. of Community Affairs, 171 N.J. Super. 193 (App. Div. 1979).

In an age discrimination case, the test for a prima facie case requires the petitioner to demonstrate by a preponderance of the evidence that: (a) she was in a protected age group; (b) the petitioner was qualified; (c) the petitioner was nevertheless adversely affected; and (d) the respondent sought someone else with similar qualifications to perform the work. See, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 82 (1978), adopting tests set forth in McDonnell Douglas Corporation v. Green, 411 U.S. 792, 802 (1973). The McDonnell Douglas tests are to be used only where and to the extent that their application is appropriate. Peper at 83.

McDonnell Douglas holds that an employee who is a member of a protected group and who is qualified for hiring may not be rejected for any reason other than the fact that another seemingly qualified individual was selected for some non-invidious reason. Peper at 84.

Here petitioner asserts in her letter brief that she is 59 years old—an assertion not challenged by the Board. Anna Cacciatore is between 35 and 45, 14 to 24 years her junior. The Board did not stipulate the age of either from its records. It merely relied on my inquiry at hearing as to the age of each teacher. According to the Board's brief, the teachers' ages could have differed as little as 10 years or as much as 30 years.

In this case the petitioner, a 59-year-old female, belonged to a protected class. She was qualified to be head teacher and sought the position. She was rejected as head teacher. Further, the record is undisputed that the vacancy was subsequently filled by a younger and no better qualified female.

There was, admittedly a personal bias against petitioner. There is also one admitted instance of a social relationship between the principal's and Ms. Cacciatore's families. Given these proofs in addition to petitioner's satisfying the elements required by the McDonnell Douglas tests, I **CONCLUDE** from the evidence and its inferences that the principal's explanation for a change in the head teacher position is a pretext for unlawful discrimination. See, Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 32 (1981).

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Jackson v. Concord Co., 54 N.J. 113, 119 (1969) is a case about racial discrimination. Nevertheless, the following quote from that case may easily be applied to the instant matter:

> Certainly the policy and requirements of the Law Against Discrimination cannot be thwarted by any kind of indirection and attempted subtlety. Dilatory or evasive conduct toward a member of a class which the statute is designed to assist and protect is a badge of unlawful discrimination. Although the burden of persuasion by a preponderance of the evidence rests with the complainant throughout, when such a course of conduct appears a strong case is made out, and a respondent has a heavy task to justify his actions. The effort of these respondents was indeed feeble and utterly unconvincing.

Finally, nothing in the record shows that petitioner was not performing her job satisfactorily as a head teacher. Consequently, the true reason for petitioner's non-reappointment was her age - that is, the principal's desire to appoint "young blood" or "new blood" to the position.

Based on all of the above, petitioner's appeal is **GRANTED.**

The Board determination in failing to reappoint petitioner to the head teacher position was based on arbitrary and capricious reasons by the principal. There was no reasonable, rational, or educational criteria shown for petitioner's nonreappointment.

Therefore, the Board is **ORDERED** to reinstate petitioner to the position as head teacher of Cluster IV for the 1985-86 school year and reimburse her with the appropriate stipend for the year.

If petitioner no longer desires the position, she is, nevertheless, entitled to the stipend for 1985-86.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

10 March 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 13 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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WITNESSES

Anne Maiorino, petitioner
Don Ernest Schreiber, principal

DOCUMENTS IN EVIDENCE

P-1	Board minutes, dated May 28, 1985
P-2	Superintendent's memorandum, dated May 28, 1985
P-3	Notice to petitioner, dated May 20, 1985
P-4	Petitioner's letter to the superintendent (prepared approximately May 29, 1985)
P-5	Seniority list, dated October 3, 1984 [1985]
P-6	Seniority list, dated October 10, 1985
P-7	Head Teacher Responsibilities
P-8	Petitioner's Evaluation, 1984-85
P-9	Schreiber memorandum, dated May 20, 1985
P-10	Brozio form, dated March 7, 1985
P-11	Altman form, dated March 27, 1985
P-12	Gerber form, dated March 5, 1985
P-13	Cacciatore form, dated March 4, 1985
P-14	Maiorino form, dated March 5, 1985
P-15	Requisitions by Cacciatore
P-16	Requisitions by Cacciatore
P-17	Requisitions by Cacciatore

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ANNE MAIORINO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL AND TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board avers, inter alia, that the decision of the ALJ should be set aside for the following reasons:

1. Petitioner has not established that she has 18 years of satisfactory service as a head teacher, as there were two other principals with whom she previously worked, who apparently were lax in their relationship with head teachers. Further, the Board avers, head teachers are appointed at the discretion of the principal and the board. There is no required notice necessary to terminate the job, nor to hire a particular individual as head teacher. The Board contends that petitioner /"was obviously emotionally disturbed when advised that she was not going to be reappointed as head teacher and has never testified that Mr. Schreiber actually said she was to (sic) old." Rather, the Board avows that the principal wanted "new blood" not "young blood," as suggested by petitioner. The Board suggests that petitioner did not know what was said as she was upset over not being reappointed. (Exceptions, at p.2)

2. The Board states that there was no evidence whatsoever at the hearing, under oath, as to the actual age of petitioner nor the actual age of the teacher that was hired to replace petitioner, "which is crucial to this matter." (Exceptions, at p. 2)

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3. The ALJ cites a letter brief submitted after the hearing was closed, which indicates that the petitioner was 59 years of age, and that the teacher appointed to replace petitioner was between 35 and 45 years of age. This, the Board avows, is not evidence, but rather argument. For the ALJ to supplement the record and base his decision for age discrimination on unsworn testimony is improper.

4. The Board enclosed with its exceptions a transcript of the hearing and referred the Commissioner to numerous references therein suggesting that the charges are "a false accusation by an emotional teacher who has a personality conflict with the principal." (Exceptions, at p. 3)

5. Lastly, Board counsel states: "The Administrative Law Judge states that the Principal's testimony was to (sic) convenient and misleading, when in fact he was candid and admitted that when he went back to his office and found the sheets, that the teacher had apparently not requested the appointment. I am at a loss as to his thinking, because if he were not truthful, he could have easily said that he could not find the document, or he simply could have corrected it by checking the box on the exhibit. [P-13]" (Exceptions, at p. 3)

The Board urges the Commissioner to reverse the decision of the ALJ and find that its actions were proper.

Petitioner's reply exceptions aver that the Board's exceptions reduce to a single proposition that it disagrees with the findings of fact made by the ALJ. Petitioner contends, "Citations are not necessary to support the proposition that the finder of fact is in the best position to judge credibility and to the extent that his findings are based on the credibility of the witnesses, those findings must be sustained." (Reply Exceptions, at p. 1) To petitioner's reply exceptions were affixed her original brief and reply brief submitted to the ALJ. Petitioner states that these papers fully refute each of the contentions raised by the Board in its exceptions and are incorporated herein by reference.

Having reviewed the record, transcript and exceptions filed in this matter, the Commissioner must reject the determination of the ALJ that "the true reason for petitioner's non-reappointment was her age***. (Initial Decision, ante) for the reasons that follow.

The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C.A. 623, as amended in 1978, prohibits discrimination in employment against individuals who are at least 40 years of age but

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less than 70 years (i.e., 40 through 69). The age ceiling was raised from 65 to 70 pursuant to the 1978 amendment.[1] As suggested by the ALJ in the instant matter, the order, allocation and standard of proof set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) apply to cases brought under the ADEA. In an age discrimination case, the test for a prima facie case requires petitioner to demonstrate by a preponderance of the evidence that: (a) she was in a protected group; (b) she was qualified; (c) she was nevertheless adversely affected; and (d) the Board sought someone else with similar qualifications to perform the work. See also, Peper v. Princeton Univ. Bd. of Trustees, 77 N.J. 55, 82(1978), adopting tests set forth in McDonnell-Douglas. The McDonnell-Douglas as tests are to be used only where and to the extent that their application is appropriate. Peper at 83 Also recognized by the ALJ, McDonnell-Douglas holds that an employee who is a member of a protected group and who is qualified for hiring may not be rejected for any reason other than the fact that another seemingly qualified individual was selected for some non-invidious reason. Peper at 84 Since the record herein establishes that petitioner was 59 years of age at the time of her nonreappointment to the position of head teacher, that she was qualified to hold that position by virtue of her having done so for 18 years theretofore without adverse comment from the Board, that she was indeed relieved of her responsibilities as head teacher, and that the Board did hire a younger individual with similar or lesser qualifications to perform the work, the Commissioner agrees with the ALJ that petitioner has satisfied her burden of presenting a prima facie age discrimination case.

Once the plaintiff in an age discrimination case succeeds in making a prima facie showing, the defendant must "articulate" some nondiscriminatory reason for the action or privilege under one of the statutory exceptions.[2] In New Jersey, the defendant must assume responsibility for introducing evidence which proposes a reasonable, nondiscriminatory basis for the decision; he is not required to prove absence of discriminatory motive. See Smithers v. Bailar, 23 FEP 1197, 1203 (D. N.J. 1979), aff'd 629 F.2d 892, 23 FEP 1206 (3d Cir. 1980)

In the instant matter, the principal testified that:

[1]Schlei, Barbara Lindemann and Grossman, Paul, Employment Discrimination Law. Chicago: 1983 American Bar Association, p. 482

[2]Id. at 499-500.

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Upon appointing several new teachers into the commercial foods program, that area took a whole new direction, and the fact that we wanted to attract a number of students to the commercial foods program, almost doubling its enrollment, and especially to the disadvantaged, which we received vocational funds for. In so doing, we prepared a lot of special functions.

Along with the fact that several teachers prior to that time had been having some difficulties, I thought that it would be appropriate to consider some changes in the head teacher -- in that area -- and so consequently, on May the 20th, asked Mrs. Maiorino to come to the office, which she did, and I discussed with her that possibility.

***[S]he needed to know that it was an appointment on a yearly basis, it was the discretion of the Board. Secondly, I gave her the reasons as such for my considerations. One, I was concerned with some of the teachers in that Cluster had not been performing, especially in the matter of planning, which is one area where she was to collect lesson plans. I emphasized to her it was not poor performance so much as a new direction with that Cluster.

(Tr. 80-82)

Additionally, the transcript of the hearing indicates that the principal testified as follows in response to the question, "At any time, did you ever tell her that you wanted young blood?"

A. No, sir.

Q. At any time, did you ever tell her you wanted new blood?

A. Yes, sir.

(Tr. 83)

Having reviewed the record, the Commissioner is convinced that the above testimony satisfied the Board's burden of articulating a justification for its decision in releasing petitioner from her position as head teacher for Cluster IV. Further, the Commissioner's review of the record indicates that it is not clear whether the principal, in meeting with petitioner, said he was looking for "new blood" or "young blood" to fill the position of head teacher in Cluster IV. While petitioner avers that the principal said "young blood," the principal testifies that he said "new blood." No one else was present during the conferences in question, and nowhere is the phrase actually proffered by the principal documented in writing, except in the memo written by petitioner after the April 20 or 22 meeting, wherein she interchanged both phrases.

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The courts agree that if the defendant satisfies its burden of offering a justification for the action taken, the plaintiff must then demonstrate that the defendant's articulated reason was mere pretext, or not a determinative reason. While the inference of age discrimination created by the plaintiff's prima facie case is "dispelled" once the defendant's reason is stated, the court should look to the evidence as a whole to determine whether plaintiffs have met their burden of persuasion.[3]

If the plaintiff succeeds in demonstrating pretext, the employer's articulated reason will not stand. Age-related comments have been relied upon in certain cases as evidence of intent to discriminate. However, other courts have given little credence to generalized expressions of desire on the part of management for young blood or observations that all employees reach a peak. ***An overwhelming majority of the courts have held that the plaintiff must demonstrate that "but for" age the adverse action would not have happened, or that age was a determining factor. See Smithers, supra (plaintiff failed to prove by a preponderance of the evidence that his advanced age was a determinative factor in denial of promotion).[4]

The two most recent Third Circuit cases concerning age discrimination have further refined the "but for" burden of persuasion test for which the plaintiff is ultimately responsible. In Bellissimo v. Westinghouse Electric Corp., 764 F.2d 175 (1985) the Court stated:

> Interpreting Title VII to require proof "of the determinative factor" is inconsistent with the "but for" causation test, insofar as plaintiff would be required to show that the discriminating motive was the sole reason for the action taken. More than one "but for" cause can contribute to employment decisions and if any one of those determinative factors is discriminatory, Title VII has been violated. See, Lewis v. University of Pittsburgh, 725 F.2d at 917 n. 8 (at 179)

The Bellissimo Court held:

> The "but for" test does not require a plaintiff to prove that the discriminatory reason was the determinative factor, but only that it was a determinative factor. See Smithers, supra, at p. 892. (at 179)

---

[3] Id. at 501, citation omitted.

[4] Id. at 501, 502.

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A 1984 Third Circuit case dealing with age discrimination further expounds on the plaintiff's burden of proving age discrimination. In Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (1984) the court stated:

> The ultimate burden of persuasion is that the employee has been the victim of discrimination. The employee may succeed in this either directly by persuading the court that discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence. A.D.E.A. of 1967 sec. 2 et seq. as amended 29 U.S.C.A. sec. 621 et seq.
>
> (at 1395)

(Decision of District Court not clearly erroneous where court found employer discharged 4 of 5 oldest and most highly paid salesmen and that plaintiff's performance was superior to that of younger men retained, at 1394, 1396)

While the Commissioner is convinced that the principal's recommendation to the Board that Ms. Cacciatore replace petitioner as head teacher of Cluster IV may have been biased by personal preference, he cannot agree with the ALJ that petitioner has satisfied her burden of proving that age was a determining factor in the Board's selection of Ms. Cacciatore. A mere allegation, unsubstantiated in any way, that the principal said on one occasion that "young blood" was wanted is inadequate proof of age discrimination. Likewise, petitioner has failed to convince the Commissioner, considering the record as a whole, that she was better able than the younger teacher to perform the functions required. Notwithstanding the fact that no specifics were provided by the testifying principal as to why a cosmetology teacher could not provide the "new direction" required by the Board for the position as head teacher of Cluster IV, the Board was under no obligation to do so because the position was not a tenured one. As the ALJ aptly pointed out, since "[n]o tenure attaches to the head teachers' positions," so long as the basis for the choice is not discriminatory, the principal is free to recommend whomever he wishes. See Boney v. Bd. of Ed. of Pleasantville, 1971 S.L.D. 579. (Initial Decision, ante) Further, while petitioner avers that Ms. Cacciatore's performance as the new head teacher of Cluster IV was inferior to her own experience of 18 years, the principal's testimony contradicts petitioner's. (Tr.112) Petitioner failed to produce any further convincing evidence to support her contention that Ms. Cacciatore has performed unsatisfactorily since her appointment. Finally, the record clearly establishes that the principal was entirely unaware of the ages of the respective teachers in this matter. (Tr.101)

The Commissioner particularly notes petitioner's exception regarding the role of the ALJ in making a determination regarding the credibility of witnesses. He also notes, however, that none of

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the findings relative to the question as to whether the principal was guilty of age discrimination hangs upon the determination of the credibility of the witnesses. The Commissioner's determination in this matter is based upon his perception that petitioner failed to demonstrate, notwithstanding whatever other biases may have existed, that the principal's motivation in hiring another head teacher for Cluster IV was age discrimination.

Thus, although the ALJ properly considered the totality of circumstances in applying the standard of review for age discrimination cases, the Commissioner must reject the determination of the ALJ that petitioner provided proof, by a preponderance of the credible evidence, that age discrimination was a determinative factor in her dismissal as head teacher of Cluster IV. Accordingly, the instant Petition of Appeal is dismissed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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ANNE MAIORINO,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BURLINGTON COUNTY VOCATIONAL AND TECHNICAL SCHOOLS, BURLINGTON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 25, 1986

For the Petitioner-Appellant, Katzenbach, Gildea and Rudner (Ezra D. Rosenberg, Esq., of Counsel)

For the Respondent-Respondent, John E. Queenan, Jr., Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

Anne Dillman and Alice Holzapfel opposed.

October 1, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7291-85
AGENCY DKT. NO. 342-10/85

ASHLEY SILVERMAN,

Petitioner

v.

BOARD OF EDUCATION OF THE BOROUGH OF HARRINGTON PARK,

Respondent

Jeffrey A. Bartges, Esq., for petitioner

Thomas Dunn, Esq., for respondent
(Beattie, Padovano, Breslin & Dunn, attorneys)

Record Closed: March 11, 1986 Decided: March 11, 1986

BEFORE **WARD R. YOUNG, ALJ:**

Petitioner, a tenured Superintendent of Schools, alleged the action of the Harrington Park Board of Education (Board) establishing his compensation for the 1985-86 school year was unlawful. The Board avers its determination of the Superintendent's 1985-86 salary was a proper exercise of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case on November 14, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 31, 1986, at which the parties agreed to submit the matter for summary decision in the absence of any disputed material fact. Briefs were filed in support of the respective positions of the parties, and the record closed on March 11, 1986, with the filing of petitioner's reply brief.

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The following stipulated facts are adopted herein as FINDINGS OF FACT:

1. Petitioner is the tenured Superintendent of Schools of the Harrington Park School District. The governing body of said district is the respondent Harrington Park Board of Education.

2. On or about July 6, 1983, the Board and the Superintendent entered into a written agreement governing the terms and conditions of the Superintendent's employment for the 1983-84 and 1984-85 school years. The Superintendent received the contracted salary of $53,000 for the 1984-85 school year. See J-1.

3. The Board has not adopted a salary guide governing the Superintendent other than the aforementioned two year agreement.

4. At a duly convened meeting held on June 27, 1985, the Board adopted a motion fixing the salary of the Superintendent at $53,000 for the 1985-86 school year and continuing the other terms and conditions of J-1.

The following results from a review of joint exhibits and are adopted herein as FINDINGS OF FACT:

1. The Board passed resolutions at its regular January 14, 1985 meeting which authorized the preliminary adoption of the proposed 1985-86 budget and also authorized a submission of a cap waiver request to the Commissioner of Education. See J-2.

2. The Board adopted its proposed 1985-86 budget at a special meeting on March 14, 1985 after revisions not relevant to the issue herein. See J-5.

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3. The proposed 1985-86 budget was approved by the voters, and the Board authorized the establishment of a Chart of Accounts and Appropriations for 1985-86 at its May 13, 1985 regular meeting, which incorporated an appropriation amount of $75,200 for salaries for the "Superintendent — Principal's Office." See J-6 and J-7.

ARGUMENTS OF PETITIONER

Petitioner relies on Francis W. Hyman, et al. v. Board of Education of the Twp. of Teaneck, 1983 S.L.D. __ (decided August 15, 1983), rev'd State Board of Education, 1985 S.L.D. ___ (decided March 8, 1985), aff'd App. Div. A-3508-8477 (decided February 26, 1986). This reliance is offered in support of his position that the adoption of a salary guide for full time teaching staff members by a local Board requires an adoption of a guide for its Superintendent of Schools as he is a "teaching staff member" pursuant to N.J.S.A. 18A:1-1: and is full time pursuant to N.J.S.A. 18A:29-6, and cites the State Board's conclusion at 9 of its opinion, which states:

> However, because the statute specifically authorizes the conclusion of salary schedules for all full-time teaching staff members, if a board adopts a salary policy that includes a schedule covering one group of full-time members, it must provide schedules for all such members.

Petitioner also argues that the Board had indeed fixed his salary at $55,915 by its actions indicated in the FINDINGS OF FACT above as the result of the review of joint exhibits, as well as by an established practice and unwritten policy of the Board. See Pb at 9.

Petitioner's final argument is that the Board's action of June 27, 1985 in setting the Superintendent's 1985-86 salary at $53,000 was in fact a salary reduction from the appropriated salary in its budget; was arbitrary, capricious, and unreasonable; and further that its action was procedurally improper as petitioner and the board secretary were excused from the Board's executive session prior to its determination of the Superintendent's salary.

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RESPONDENT'S ARGUMENT

The Board argues it is not required to adopt a salary guide for its Superintendent; Hyman is misconstrued by petitioner; and the Board did not fix petitioner's 1985-86 salary until it acted on June 27, 1985.

DISCUSSION AND CONCLUSIONS OF LAW

The briefs of the parties include citations of decisional law and are incorporated herein by reference.

It is noted that the Hyman matter came about by the action of supplemental teachers seeking placement on the regular teachers salary guide. It is suggested here that the holding therein requires a salary guide adoption for all groups of teachers when a local board chooses to adopt a guide for one group, and also appears to be intended to provide flexibility for local boards to establish differential guides in accordance with its local needs.

There can be no dispute that a local board has a duty to fix the salary of its Superintendent. See N.J.S.A. 18A:17-19. However, the fixing of said salary does not require a salary guide adoption, and further, an interpretation of Hyman to require same would supercede and fly in the face of legislative intent, which is clearly stated in N.J.S.A. 18A:29-4.3:

> The board of education of every school district employing one or more teaching staff members having full-time supervisory or administrative responsibilities shall adopt salary schedules for each school year that begins after the effective date of this act [January 7, 1974] for all such members, except that for a superintendent of schools the board may adopt a salary scheduled . . . (empphasis added)

A salary schedule for the superintendent is permissive, and the Board herein has opted not to adopt one.

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Petitioner's argument of procedural deficiencies on July 27 will not be addressed as no Open Public Meetings Act violations were alleged in the pleadings or incorporated as an issue in the Prehearing Order.

Petitioner's argument of arbitrariness, capriciousness, and unreasonableness by the Board is without merit. Petitioner was well aware of the Board's concern of his performance, dispatched a Board committee to discuss the salary issue with him, provided a written evaluation and considered petitioner's response to same before fixing his salary. I **FIND** that petitioner has failed to meet his burden of proof by a preponderance of credible evidence that the Board's action should be set aside. See R-2, R-3, R-4, R-5, R-6 and R-7.

Petitioner's position that appropriations for salaries incorporated in a Board's adopted budget represent fixed expenditures is without merit. If that were so, an absurdity would exist in the prohibition of unexpended appropriations from which no surplus account could exist. The budget must be viewed as a fiscal plan to enable a Board to fulfill its responsibilities to provide for thorough and efficient educational opportunities for its pupils. Said appropriations therein must not be construed to be mandatory expenditures, other than those required by board indebtedness, law, or adopted policy. In the instant matter, I know of no law or policy adoption by the Board which requires the budget appropriation for the Superintendent's salary to represent his fixed salary.

I **CONCLUDE**, therefore, that summary decision is denied petitioner but granted to the Board. The Petition of Appeal is hereby **DISMISSED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

11 March 1986
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

March 13, 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 14 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENUDM

Evidentiary Documents

J-1:	July 6, 1983 contractual agreement
J-2:	January 14, 1985 Board minutes
J-3:	Advertised 1985-86 budget
J-4:	March 11, 1985 Board minutes
J-5:	March 14, 1985 Board minutes
J-6:	April 2, 1985 election results
J-7:	May 13, 1985 Board minutes
J-8:	June 27, 1985 Board minutes
R-1:	Policy 2131 re evaluation of Superintendent
R-2:	May 10, 1984 evaluation memo
R-3:	March 18, 1985 performance evaluation
R-4:	March 29, 1985 response to R-3 by Superintendent
R-5:	April 17, 1985 final performance evaluation
R-6:	March 1, 1986 certification of W. E. Simmons
R-7:	March 1, 1986 certification of Lynn Lander
P-1:	Ashley Silverman certification

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ASHLEY SILVERMAN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HARRINGTON PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and recommended decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were not filed within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Upon examination of the record, the Commissioner adopts the recommended decision for the reasons expressed therein.

COMMISSIONER OF EDUCATION

April 28, 1986

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ASHLEY SILVERMAN,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HARRINGTON PARK, BERGEN COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 28, 1986

For the Petitioner-Appellant, Jeffrey A. Bartges, Esq.

For the Respondent-Respondent, Beattie, Padovano, Breslin and Dunn (Thomas Dunn, Esq., of Counsel)

The State Board affirms the decision of the Commissioner of Education for the reasons expressed therein.

August 6, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7119-84
AGENCY DKT. NO. 309-7/84

EDISON TOWNSHIP EDUCATION ASSOCIATION, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

R. Joseph Ferenczi, Esq., for respondent

Record Closed: January 28, 1986 Decided: March 11, 1986

BEFORE **DANIEL B. MC KEOWN,** ALJ:

This matter was opened before the Commissioner of Education on September 19, 1984 by the filing of a Petition of Appeal by the Edison Township Education Association (Association) which alleges that the Board of Education of the Township of Edison (Board) unlawfully and wrongfully terminated the employment of 50 unnamed teachers following a reduction in force, effective for the 1984-85 year. After the matter was transferred to the Office of Administrative Law for determination as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted on November 9, 1984. While it was agreed at the prehearing conference that the matter could be adjudicated by way of cross motions for summary decision, the parties thereafter requested that the matter be placed on the inactive list pending

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decisions from the New Jersey Superior Court, Appellate Division, of two cases directly related to the present matter both of which subject matters involve prior reductions in force and terminations of employment by the Board which were challenged by the Association. An Order was entered on May 24, 1985 by which the case was placed on the inactive list until September 23, 1985. On September 25, 1985, the parties were directed that their respective cross motions for summary decision were to then be filed.

The Association filed its letter memorandum in support of its motion for summary decision on December 13, 1985 while the Board, with consent of counsel, filed its response on January 27, 1986. The Association seeks summary decision in its favor on the merits of the present Appeal through an Order by which the Board would be required

> * * * to comply with the two prior decisions of the Commissioner of Education as affirmed by the State Board of Education, and further, to order [the Board] to grant retroactive seniority and salary to all individuals who should have been employed for the school year 84-85 and were not. (Association's letter memorandum)

The Board opposes the Association's motion for summary decision and seeks to have the matter returned to the inactive list for a period of three months or until the Appellate Division issues its ruling on the two prior cases. For the reasons which follow, summary decision on the merits is granted the Edison Township Education Association and the Board's request to place the matter on the inactive list for three months is denied.

BACKGROUND FACTS

The background facts of the matter set forth by the Association in its letter memorandum, agreed to by the Board in its opposition to the motion for summary decision, are as follows.

> This is the third consecutive school year in which elementary school K-8 certified individuals have filed petitions of appeal with the Commissioner of Education asserting seniority rights to positions in [the Board's] middle school, grade 6, 7, and 8. Under the prior regulations, the Commissioner and State Board of Education have twice held * * * that the Edison Township Board of Education has violated the [named and unnamed] individuals' tenure and seniority rights by failing and refusing to assign them to grade 7 and 8 in respondent's junior high school.

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This concludes a recitation of the agreed upon facts.

ASSOCIATION'S ARGUMENTS

Reciting directly from the Association's letter memorandum,

> It is the position of the Association that had the Board of Education complied with the prior two decisions of the Commissioner and State Board, a number of individuals who were riffed in school year 84-85 would have been employed in full time positions in the Board's departmentalized junior high school. (School year 84-85 the Board converted to a 6, 7, 8 departmentalized middle school system.) It is the position of the Association that the individuals involved herein had vested rights to claim junior high school positions pursuant to the above decisions despite the fact that in point of actual fact, they had not actually worked in these grades. [The Board's] actions herein prevented them in violation of two validly issued orders to have been employed prior to September 1, 1983 and subsequent to September 1, 1983 in grades 7 and 8.

Based on the foregoing contentions, the Association seeks summary decision in the form of the Order set forth above.

BOARD'S ARGUMENT IN OPPOSITION TO PETITIONER'S MOTION FOR SUMMARY DECISION

It is noted that in the Board's letter memorandum in opposition to the Association's motion for summary decision it refers to the instant Petition of Appeal as challenging abolition of positions of employment following a reduction in force for the 1985-86 school year. The Petition of Appeal challenges abolitions of employment following a reduction in force for the 1984-85 school year, not 1985-86. Reciting verbatim the Board's argument in opposition to the Association's motion for summary decision and in support of its application to place the matter on the inactive list, the Board contends

> There are two appeals presently pending in the Appellate Division which litigate the same issues for the two school years 1983-84 (sic) [1982-83] and 1984-85 (sic) [1983-84]. The Edison Township Education Association, et al., Petitioners-Respondents v. Board of Education of the Township of Edison, Middlesex County, Respondent-Appellant, Superior Court of New Jersey, Appellate

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> Division, Dkt. No. A-515-84T7, covering the school year 1983-84 (sic) [1982-83], has been scheduled for oral argument on February 3, 1986. My experience indicates that the Appellate Division generally renders its written opinion within one month from the date it hears oral argument. The second case covering the school year 1984-85 (sic) [1983-84] entitled Edison Township Education Association, Petitioner-Respondent, v. Board of Education of the Township of Edison, Middlesex County, Respondent-Appellant, Superior Court of New Jersey, Appellate Division, Dkt. No. A-2030-84T7, is waiting to be scheduled for oral argument. The two Appellate Division cases should have been consolidated but for some reason have not been. It is obvious, however, that the Appellate Division's decision on the initial case scheduled for argument on February 3, 1986 will be dispositive of the cases pending for the succeeding years.
>
> Further, the Petitioners have not sought to enforce the previous decisions of the Commissioner of Education or the State Board of Education pending the appeals to the Appellate Division, pursuant to agreement.
>
> Therefore, [the Board] respectfully submit[s] that the instant matter should be placed on an inactive list for a period of three months. Prior to that time it will be rendered moot by the expected decision from the Appellate Division.

This concludes a recitation of the respective arguments of the parties on the Association's motion for summary decision.

FINDINGS

Each of the three actions filed by the Association, including the present action, against the Board regarding abolitions of employment following reductions in force each year between 1982-83 through 1984-85 will, in light of the absence of compliance with the State Board of Education's final administrative decision in favor of the Association, have a domino affect on each successive abolition of employment following a reduction in force action taken by the Board. As an example, persons who should have been reinstated to their positions of employment under the final administrative decisions for 1982-83 but who were not, may have a continuing claim against the Board for 1983-84 and 1984-85 but their claims then will be joined by other persons whose position of employment have been abolished contrary to the requirements of the seniority regulations at N.J.A.C. 6:3-1.10, either as before or after amendment.

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The Association, it is noted, is obligated to have filed the instant Petition of Appeal on behalf of persons, yet unnamed, whose seniority rights may have been violated by the Board regarding the abolition of employment for 1984-85 to comply with the 90 day rule, N.J.A.C. 6:24-1.2.

Summary decision is appropriate when there are no material, relevant facts in dispute. In this case, the facts are clear that the instant Petition of Appeal was filed to preserve claims for seniority rights of unnamed teachers following the implementation by the Board of the two prior decisions by the State Board of Education which, as I understand this case, shall by agreement of the parties occur upon the rulings issued by the Appellate Division on the two prior cases. That being so, this case presents no substantive issue to be addressed other than to preserve the interests of teaching staff members who may have been affected by a reduction in force through the subsequent loss of employment for 1984-85 because of the delays by the Board to implement prior administrative decisions.

CONCLUSION

There is no need to place this case on the inactive list for an additional period of time because both sides agree that the Appellate Division decisions in the two former cases shall be dispositive of this case. Accordingly, summary decision is **GRANTED** the Edison Township Education Association and the Edison Township Board of Education is **ORDERED** to comply with, absent reversal by the Appellate Division, the two prior decisions of the Commissioner of Education as affirmed by the State Board of Education, and the Edison Township Board of Education is further **ORDERED** to grant seniority and salary and employment to all individuals who should have been employed for the school year 1984-85, but who were not, so long as their claims are consistent with prior administrative decisions in the two earlier cases.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 11, 1986
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

MAR 12 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 14 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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EDISON TOWNSHIP EDUCATION ASSOCIATION, ON ITS OWN BEHALF AND ON BEHALF OF ITS MEMBERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter involving the initial decision rendered by the Office of Administrative Law.

It is observed that no exceptions to the initial decision have been filed by the respective parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

It is further observed that the judge has granted summary judgment on petitioner's behalf specifically for the following reasons:

> ***There is no need to place this case on the inactive list for an additional period of time because both sides agree that the Appellate Division decisions in the two former cases shall be dispositive of this case. Accordingly, summary decision is GRANTED the Edison Township Education Association and the Edison Township Board of Education is ORDERED to comply with, absent reversal by the Appellate Division, the two prior decisions of the Commissioner of

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> Education as affirmed by the State Board of Education, and the Edison Township Board of Education is further ORDERED to grant seniority and salary and employment to all individuals who should have been employed for the school year 1984-85, but who were not, so long as their claims are consistent with prior administrative decisions in the two earlier cases.***
>
> (emphasis supplied)
> (Initial Decision, at p. 5)

It is noted here that the Appellate Division decisions in Edison were rendered on February 11, 1986 (A-2030-84T7) and February 26, 1986 (A-515-84T7).

Each of the above-referenced Court decisions affirms the prior determinations of the Commissioner and the State Board of Education which grant the relief petitioner was seeking.

Accordingly, pursuant to the agreement reached by the parties that the former matters decided by the Courts would be dispositive of the instant proceedings, summary judgment is granted herein on petitioner's behalf. The Board is hereby directed to grant seniority, salary and employment to all individuals who should have been employed for the 1984-85 school year, provided that their claims are consistent with the prior administrative decisions in the two earlier cases.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATON

APRIL 28, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8184-85
(on remand of EDU 6367-84)
AGENCY DKT. NO. 347-8/84

BELLEVILLE EDUCATION ASSOCIATION,
on behalf of FRANCES GALLOWAY,
Petitioner

v.

BOARD OF EDUCATION OF THE
TOWN OF BELLEVILLE,
Respondent

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen and Blunda, attorneys)

Nathanya Simon, Esq., for respondent
(Schwartz, Pisano and Simon, attorneys)

Record Closed: February 7, 1986 Decided: March 11, 1986

BEFORE WARD R. YOUNG, ALJ:

Petitioner alleged the Belleville Board of Education (Board) acted in violation of N.J.S.A. 18A:6-10 when it reduced her salary upon transfer from a classroom teacher assignment into the Basic Skills Improvement Program for the 1984-85 school year.

The Board denied any impropriety and states its action was a managerial prerogative not inconsistent with law.

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The matter was initially transmitted to the Office of Administrative Law as a contested case pursuant N.J.S.A. 52:14F-1 et seq. on August 28, 1984 and docketed as EDU 6367-84. An Initial Decision was rendered on November 7, 1985 on the disputed salary issue, wherein neither petitioner's transfer nor tenured status were at issue. The Commissioner properly remanded the matter because of the questionable tenure status of petitioner, which was inadvertently overlooked by the parties as well as the undersigned. Belleville Education Association on behalf of Frances Galloway v. Board of Education of the Town of Belleville, 1985 S.L.D. _____ (decided December 20, 1985).

The matter was retransmitted to the Office of Administrative Law on December 23, 1985, and resubmitted for summary decision with a supplemental stipulation of fact and supplemental briefs. The record closed on February 7, 1986, the date established for filing of final briefs.

The gravamen of this dispute is solely the salary entitlement of Frances Galloway for the 1984-85 school year.

Galloway's salary for the 1983-84 school year as a classroom teacher was established at $17,300.00 in accordance with Step 6 of the teachers' guide pursuant to the Order of Judgment entered on May 23, 1985 by the Hon. David Landau, J.S.C. See J-8. Said Order resulted from an alleged breach of contract.

The dispute herein relates to Galloway's 1984-85 salary claim upon her transfer from a regular classroom assignment to the Basic Skills Improvement Program.

The parties have stipulated that Galloway did not achieve a status of tenure as of September 1, 1984.

The Board argues that Galloway is not entitled to the protection of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 as she was a non-tenured teacher staff member, and cites considerable case law in support of its position that Galloway is not entitled to placement

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on the teacher's salary guide for 1984-85 because of her transfer. See the Board's letter memorandum under date of February 6, 1986.

Galloway argues that a separately negotiated salary guide for basic skills teachers was eliminated in the agreement reached on January 24, 1983 between the Basic Skills Improvement Instructors' Association and the Board. See J-2.

Paragraph 3 of the aforementioned agreement states:

> All individuals who are placed on sub-step 1 ($13,000.00), and who are employed in September 1983, shall move to step 1 on the 1983-84 teachers' guide. All other unit members who are employed in September 1983, shall mvoe up one step on the 1983-84 teachers' guide.

It is now well established that salary entitlement is a matter of contract in the absence of statutory inconsistencies. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63 (1982).

It is also established that differentiated salary guides may be adopted by local boards of education. Francis W. Hyman, et al. v. Board of Education of the Twp. of Teaneck, 1983 S.L.D. _____ (decided August 15, 1983), rev'd State Bd. of Ed., 1985 S.L.D. _____ (decided March 8, 1985), aff'd App. Div. A-3508-8477 (decided February 26, 1986). It is noted that the Appellate Division expressly declined to address years of service for salary guide placement, leaving same for consideration by the State Board in the first instance in Ball, et al. v. Teaneck Bd. of Ed.

I agree with the Board's contention that Galloway is not entitled to the protections of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 because of her non-tenured status as of September 1, 1984.

In the absence of a differentiated salary guide for the 1984-85 school year for teachers assigned to the Basic Skills Program, the intent of the parties incorporated in its last agreement for the 1982-83 school years appears to be dispositive of the dispute herein.

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A review of the entire record results in the adoption of the following FINDINGS OF FACT:

1. Frances Galloway was non-tenured as of September 1, 1984.

2. Frances Galloway was placed on Step 6 of the teachers' salary guide for the 1984-85 school year by Order for Judgment. J-8.

3. Pursuant to the agreement entered on January 24, 1983, Frances Galloway, employed in September 1983, shall move up one step on the teachers' salary guide in 1984-85. See J-2.

I **CONCLUDE**, therefore, that Frances Galloway is entitled to be placed on Step 7 of the Teachers' Salary Guide for the 1984-85 school year and compensated at the annual rate of $18,425.00 pursuant to the 1984-87 contractual agreement between the Education Association and the Board. See J-11. Such placement is hereby **ORDERED** with payment of the salary differential consistent with the determination herein.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

11 March 1986
DATE

WARD R. YOUNG, ALJ

MAR 13 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 14 1986
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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ADDENDUM

Evidentiary Documents

J-1	1982-1983 Memo of Agreement
J-2	1982-1983 Contractual Agreement
J-3	Petitioner's 1982-83 contract
J-4	Petitioner's 1983-84 contract
J-5	1982-1984 Contractual Agreement
J-6	October 25, 1983 Letter, Nardiello to Galloway
J-7	March 7, 1984 AAA opinion and award
J-8	May 23, 1985 Order for Judgment
J-9	August 13, 1984 letter, Appleton to Galloway
J-10	Petitioner's 1984-85 contract with attached August 30, 1984 memo
J-11	1984-87 contractual agreement

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BELLEVILLE EDUCATION ASSOCIATION, :
on behalf of FRANCIS GALLOWAY,

PETITIONER, :

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWN : DECISION ON REMAND
OF BELLEVILLE, ESSEX COUNTY,

RESPONDENT. :

:

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the Board within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board submits in exceptions that its position is for the legal ability to maintain a two-track salary system for its basic skills teachers and the regular teaching staff in the classroom. The Board avers that while petitioner, as a regular classroom teacher, was to be paid on the regular classroom salary guide, as determined by the Appellate Division, upon her reassignment back to the basic skills area in the absence of tenure, she should be reinstated on the basic skills salary guide. The Board incorporated all its other arguments in the matter by reference to its previous submission.

Having reviewed the record in this matter, including the submission of the parties filed originally as a contested case on August 28, 1984, the Commissioner affirms the determination of the ALJ that Frances Galloway is entitled to be placed on Step 7 of the Teachers' Salary Guide for the 1984-85 school year and compensated at the annual rate of $18,425 pursuant to the 1984-87 contractual agreement between the Education Association and the Board for the following reasons.

Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982) stands for the proposition that "public school teachers who provide part-time remedial or supplemental instruction to educationally disabled children may acquire tenure if they meet the specific criteria in N.J.S.A. 18A:28-5." (at 84) As noted by the ALJ, however, the Court in Spiewak did not address

> ***what, if any, additional benefits the teachers in these cases are entitled to, either retroactively or prospectively. That is primarily a matter of contract and the relevant collective bargaining agreements are not a part of the record.*** (at 84, note 3)

Thus, there is no automatic entitlement to salary, except where statutorily dictated.

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It is now also well established that differentiated salary guides may be adopted by local boards of education. Frances W. Hyman et al. v. Board of Education of the Township of Teaneck, decided by the Commissioner August 15, 1983, rev'd State Board March 8, 1985, aff'd N.J. Superior Court, Appellate Division February 26, 1986 The Commissioner notes, as did the ALJ, that the Appellate Division in Hyman expressly declined to address years of service for salary guide placement, leaving same for consideration by the State Board in the first instance in Ball et al. v. TeaneckBoard of Education. (Hyman, Superior Court decision, at p. 2) (Initial Decision, ante)

Since the record in the instant matter establishes that

1. petitioner was not entitled to the protections of N.J.S.A. 18A:6-10 and N.J.S.A. 18A:28-5 as of September 1, 1984 because of her nontenured status and

2. a separately negotiated salary guide for basic skills teachers was eliminated in an agreement reached on January 24, 1983 between the Basic Skills Improvement Instructors' Association and the Board (see J-2 and affidavit of William J. Kennelly, Chief Negotiator for the Belleville Education Association), the Commissioner is in accord with the ALJ that:

> In the absence of a differentiated salary guide for the 1984-85 school year for teachers assigned to the Basic Skills Program, the intent of the parties incorporated in its last agreement for the 1982-83 school years appears to be dispositive of the dispute herein.
> (Initial Decision, ante)

That is to say, at the time that Ms. Galloway, a nontenured teacher, was assigned back to a position as a basic skills teacher for the 1984-85 school year from a position as a regular classroom teacher, she had already been placed, by Court Order, on Step 6 ($17,300) of the teachers' salary guide for the 1983-84 school year. By virtue of the Board's having eliminated separate guides for basic skills teachers (a Hyman guide) in the negotiated agreement of 1982-83, the Board was required thereafter to move petitioner up to the 7th step of the 1984-85 teachers' salary guide ($18,425). That there was provided on the teachers' guide a separate category for basic skills teachers is irrelevant to the instant matter. The Commissioner is obliged to acknowledge the action taken by the Appellate Division in placing her at Step 6 of the 1983-84 school year. Any further determination as to Ms. Galloway's salary for subsequent years must take into account her placement on the guide at Step 6 for the 1983-84 school year.

Consequently, the Commissioner adopts the determination of the ALJ that Frances Galloway is entitled to be placed on Step 7 of the Teachers' Salary Guide for the 1984-85 school year and compensated at the annual rate of $18,425 pursuant to the 1984-87

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contractual agreement between the Education Association and the Board. (See J-11.) Accordingly, such placement is hereby directed with payment of the salary differential consistent with the determination herein. The Petition of Appeal is accordingly dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6887-85

AGENCY DKT. NO. 372-1/85

H.O. FOR HIS SON, G.O.,
Petitioner,
v.
MONTGOMERY TOWNSHIP BOARD OF EDUCATION, CHARLES WEBB, ATHLETIC DIRECTOR, AND MALCOLM D. EVANS, SUPERINTENDENT,
Respondents.

Harold S. O'Brian, Jr., Esq., petitioner

A. Dix Skillman, Esq., for respondents Montgomery Township Board of Education and Superintendent

Kenneth I. Nowak, Esq., for respondent Webb (Zazzali, Zazzali and Kroll, attorneys)

Record Closed: January 29, 1986 Decided: March 12, 1986

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Action for an order of the Commissioner of Education restraining the Montgomery Township Board of Education (Board) from preventing G.O. from participation on the Montgomery High School boys' varsity soccer team through the remainder of the 1985 season.

The matter was filed with the Commissioner of Education on October 28, 1985. The petitioner sought immediate reinstatement of G.O. to the soccer team, final

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determination that G.O. was wrongfully discharged from the team and an order directing the Board to discontinue use in any form of exclusionary practices in respect to any and all Montgomery athletic programs.

The matter was transmitted, without answer, to the Office of Administrative Law on October 30, 1985. An oral argument on motion for interim relief pursuant to N.J.A.C. 6:24-1.5 was held at 1:30 p.m. November 1, 1985, at the Office of Administrative Law, Trenton. The motion was denied for reasons expressed in the record.

Plenary hearing was held on December 13, 1985, at the Office of Administrative Law, Trenton. At the conclusion of hearing, a schedule of posthearing submissions was established which later was enlarged for good cause shown. The last submission was received, and the record closed, on January 29, 1986.

RELEVANT EVIDENCE

G.O. testified that he is a 17-year-old senior pupil at Montgomery High School. He has played soccer in various leagues since he was 8 years old. He attended a summer soccer camp in 1982.

In Montgomery, he played on the seventh- and eighth-grade team. When he was in ninth grade, he played on the freshman team and when he was in tenth and eleventh grades, he played on the junior varsity team.

In September 1985, he attended all preseason training and practice sessions. He plans to play soccer in the future. He has applied to colleges and has mentioned in his applications that he plays interscholastic soccer.

Each of the four soccer teams has its own coach, own schedule and own playing area. It was stipulated by all counsel that the playing areas are large and generally in excellent shape.

G.O. tried out in September 1985. During those tryouts, freshmen tried out separately and all others tried out in a group. Approximately 40 nonfreshmen tried out for the junior varsity and varsity teams.

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When Coach Webb announced his varsity team, five seniors, including G.O., were not on the roster. No nonseniors were cut.

The persons cut from the junior varsity team were those who did not show up for practices. Thus, cuts from the junior varsity team were not made on the basis of playing skill. A junior pupil cut from the varsity team could play on the junior varsity team. Seniors, however, if cut from the varsity team, were not eligible to play on any other team.

In 1982, 1983 and 1984, the varsity team was composed almost entirely of juniors and seniors. The 1985 team composition is eight seniors, eight juniors or sophomores and two freshmen. In September, all cuts from the varsity team were seniors. All had prior experience. Four had been on the varsity team in 1984. G.O. had been on the junior varsity team in 1984. G.O. expressed the opinion that there was little ability difference between the players cut and the players retained.

Several documents were admitted in evidence by consent. P-1 is the Board's policy on interscholastic competition eligibility, adopted January 7, 1985. P-2 is pages 1, 20 and 21 of the student handbook for 1985-86. P-4 is an excerpt from the New Jersey State Interscholastic Athletic Association (NJSIAA) 1985-86 Constitution, Bylaws, and Rules and Regulations. P-5 is the athletic and extra-curricular activity eligibility requirements, policy 6145.2 (a) and (b) approved by the Montgomery Board of Education on February 4, 1985.

G.O. believes that he was denied an opportunity under P-1 to participate in extracurricular activities. Further, he was academically eligible at the time and could not have been eliminated on that ground. He also meets all criteria set forth in P-5. In the 1985 fall season, G.O. had cross-country and soccer available to him. More people went out for soccer than for cross-country. He was never told that he did not satisfy the coach's criteria for selection to the varsity soccer team.

G.O. also believes his age was used as a reason to cut him from the team. Freshmen, sophomores and juniors could try out for three teams. Seniors can try out only for the varsity. Seniors, if cut, are not placed on the junior varsity team.

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According to the State Interscholastic Athletic Association Constitution, athletics should be a part of his education, but he was denied equal opportunity.

G.O. spoke to the coach concerning criteria for selection to the team after he was cut from the team. The coach had spoken to seniors at least twice during the pre-season practices. The witness believes the coach wanted a younger team and "just didn't want so many seniors."

G.O. stated that the coach told him he would rather play younger players than seniors. He told G.O. that if G.O. were on the bench and a younger player also were on the bench, it would be more beneficial to the team to play the younger player. The team would benefit in the future if the younger player were played. He recalls no other statements or policies concerning criteria for eligibility. He was not told before the cut that seniors could not play on the junior varsity team. He was not told why 18 persons were selected for the varsity team.

G.O. does not believe he had an automatic right to be on the team as a senior. Ability should be taken into account in the selection of those persons who will be on the varsity team.

The Board presented an officer of the New Jersey State Interscholastic Athletic Association. He stated that there is no requirement that seniors be allowed to play. No specific rules describe how to determine the ability of a player; coaches do that. There is no rule violated if a coach cuts a senior based on ability or behavior. In his experience, the overwhelming majority of schools do cut seniors.

If the policy were to place seniors on teams automatically, this could have an effect on costs and on coaching. Obviously, costs would be greater and coaches would have more players on their teams, but not necessarily more players fielded.

The witness testified he does not know if or how many schools have a no-cut soccer policy. He also stated it is rare to allow seniors to play on junior varsity teams but nothing prohibits this. In his opinion, districts with no-cut policies usually have few pupils trying out for teams.

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The athletic director and varsity soccer coach also testified. He has been varsity soccer coach for 17 years. The Montgomery High School varsity soccer team does not participate in an athletic conference at this time. Concerning the selection of his team in 1985, the coach stated he had all players and candidates out in early September. After several days of practice, he placed players by ability. Over the first few days of practice, there was no freshman coach. He and the junior varsity coach handled the whole group. Shortly after Labor Day, the coach started to block out his teams. He stated, during practices, that seniors were not automatically on any team. In previous seasons, relatively few players were available for the junior varsity and varsity teams. This year, however, he had a larger pool from which to draw.

Some seniors seemed to behave as if they had an entitlement to placement on the team. He made several remarks to spur these seniors to do their best. He believed they assumed they "had it made." This attitude first came to his attention in the prior spring. Talking to certain players, he believed they thought they would automatically be placed on the varsity team in the fall. At the first tryouts, approximately 70 players in grades 9-12 turned out. The coach, as described, determined the size of his teams and the particular selection of pupils by a "best use" principle.

Concerning G.O., the coach testfied that the inclusion of G.O., based on his abilities and talents, would not benefit the team. Abilities and talents were the only factors in comparing G.O. to others trying out. Five other seniors were cut from the team.

No policy forbids seniors from playing on the junior varsity team. The coach, however, does look at the junior varsity as a preparation for varsity play. It would defeat the purpose to place cut seniors on the junior varsity. Several years ago, that is, prior to 1982, he had more pupils trying out for the teams than there were places on the teams. He made cuts from the varsity during that period just as he did in 1985. When he made the varsity cuts in 1985, his primary concern was the ability of the candidates.

This year he and the junior varsity coach chose not to put seniors on the junior varsity. No State Interscholastic Athletic Association rule or other rule precludes seniors from playing on the team. When numbers of candidates were low, in order to keep the freshman team going, he directed the junior varsity coach to take no freshman or a

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limited number of freshmen. When candidate numbers were sufficient, freshmen with ability were allowed to move up.

Freshmen can play on the freshman, junior varsity and varsity teams. Sophomores and juniors can play on the junior varsity or varsity teams. They are not allowed to play below their level; they can play above their level, that is, on the varsity team.

Past practice has been not to play cut seniors on the junior varsity or cut junior varsity players on the freshman team if there were enough players to fill out those teams. Seniors are, in effect, limited to one team and that is the varsity team.

When the coach set up his varsity team, he named those persons he wanted to the team. He showed the names of those he did not select to the junior varsity coach. The junior varsity coach selected some and nonselected some. Nonselection to the junior varsity team was based on attendance, spirit and ability. There are no written criteria for player selection. Selections are based on the coach's judgment. The size of a particular team is also up to the coach. However, his freedom to choose is often shaped by the number of potential players available.

An 18-member varsity was not his criterion. It happened that the 18 persons he came up with made the strongest team he believed he could have. Any additional player was of significantly lesser ability than the 18 selected. He wanted the best team possible. He drew the line at 18, based on ability to contribute to the team. The number could easily have been something else, depending upon the abilities of the various candidates.

After G.O. was cut from the team, the coach spoke to him. The coach discussed his reasons for selections. He told G.O. that he had younger, better players who would play ahead of G.O. even if G.O. were placed on the team. G.O. never was on the varsity team. Therefore, he was nonselected rather than cut.

ARGUMENTS OF THE PARTIES

The petitioner argues that the athletic director acted wrongly and contrary to the policy of the Montgomery Board of Education in excluding petitioner from the

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Montgomery Soccer Program. The Board authorized the organization and funding of interscholastic athletic programs. The Board determined and decided that participation in athletic programs would be available to all students at the school and, further, that the administration and coaches would promote and encourage the participation of students in such programs. The Board adopted P-1 on January 7, 1985. It provides, among other things, that extracurriculuar activities and athletics should be made available to all students and that it is the desire of the Board to have a broad extracurricular policy designed to encourage those students for whom participation in such activities is a major motivation for remaining in school.

The Board defines eligibility requirements for participation in P-5, approved on February 4, 1985. This policy states that interscholastic athletics and extracurricular activities are open to pupils in grades 9-12, provided they satisfy the following criteria:

For Athletics:

1. Have not reached the age of 19 by September 1st.

2. Can represent the high school in athletic competition for eight (8) consecutive semesters following entrance into 9th grade.

3. Must have passed 25% of the credits required for graduation by the State of New Jersey during the preceding academic year to be eligible for athletic competition during the first semester (September 1 to January 31) of the 10th grade or higher or the second year of attendance in a secondary school or beyond.

4. Must have passed the equivalent of 12 1/2% of the credits required by the State of New Jersey for graduation at the close of the preceding semester (January 31). Full courses shall be equated to one-half of the total credits to be gained for the full year to determine credits passed during the immediately preceding semester.

5. Shall be allowed to finish the season notwithstanding the provisions of paragraph 3 and 4 above.

6. Are legal residents of the district, or meet the non-resident requirements set forth in Regulation 5118, or have been approved as tuition students, or are transfer students due to a move to the district by the parent or guardian. Students are eligible to compete after thirty (30) calendar days after moving into the district.

7. Have not been retained/obtained to play on a team.

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8. Have passed a physical examination given by the school physician or a comparable physical given by the family physician.

9. Have completed and returned the parent consent form.

The Board has not adopted or published any other eligibility criteria or prerequisites for student participation in the athletic program. The Board has authorized and approved the publication of the Montgomery Student Handbook (P-2). The Handbook is distributed to all Montgomery students and is the only school publication that describes the school's athletic programs and eligibility criteria. On page 20, the Handbook states that "Montgomery High School offers a number of academic, recreational, and athletic activities. We encourage you to look them over and participate in as many as you can."

Several lines below on the same page under the caption "Athletics" the Handbook states "These programs are open to students in grades 9-12, provided that they satisfy these criteria. . . ." The criteria listed are the same as those set forth in P-5, above.

The Handbook also encourages student participation in extracurricular activities in the introduction on page 1:

> Optimum results are usually achieved when the school, parents and the students work in harmony in planning a program, but the ultimate success or failure of each individual is correlated to his willingness to work hard in and out of the classroom, including enrolling in one of the many fine electives that are offered and by investing some time in taking part in extra-curricular activities such as drama, student council and athletics. [emphasis added.]

The Handbook also states that the Board does not discriminate on the basis of age in any of its policies or regulations related to services, programs or activities.

The NJSIAA Constitution (P-4), adopted by the Board, promotes student participation in interscholastic athletics and indicates a philosophy that athletics contribute to education. The rules state, among other things:

> Participation in sound and wholesome athletic programs contributes to health, physical skill, instructional maturity, social competencies, and moral values. Cooperation and competition are

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> both important components of American life; therefore, the experience of playing athletic games should be a part of the education of all youth who attend our secondary schools.

The New Jersey Legislature has determined that a major element, goal and standard of a thorough and efficient system of free public schools includes a breadth of program offerings designed to develop the individual talents and abilities of pupils. N.J.S.A. 18A:7A-2, 7A-5. State educational goals include helping every pupil form responsible relations with a wide range of other people. The public schools are required to provide significant opportunities for helping to determine the nature of the educational experiences of the pupil and specialized kinds of educational experiences to meet the needs of the pupil. Finally, the public schools are obliged to apply practices to insure the safety and health of students engaged in athletic activities. N.J.A.C. 6:29-2.1, 6.4.

The petitioner iterates that the varsity team this year is made up of two freshmen, three sophomores, five juniors and eight seniors. Further, the soccer program facilities at Montgomery, including the soccer fields, the coaches, equipment and locker rooms are extensive. They are capable of including many more students than the 51 permitted to participate in 1985 by the athletic director.

Because the selection, as well as the number, of otherwise fully qualified students who will be permitted to play on the varsity and junior varsity athletic teams is controlled by the athletic director, and because the school and the athletic department do not have any written criteria, guidelines, procedures or rules describing the selection criteria, and because the criteria applied by the director were different in 1985 than in prior years, the petitioner contends he has been wrongfully excluded.

When, on or about September 9, 1985, the petitioner was nonselected to the varsity soccer team, he was thereby excluded from the soccer program because the athletic director enforced a rule of his own making that prohibited senior class players from playing on any Montgomery team other than the varsity team. This rule has no authority or support in any Montgomery policy or procedure nor is it suggested by the NJSIAA rules or the legislation and Administrative Code applicable.

The director states that the cut or nonselected players had lower skill levels than the retained players. The petitioner disputes this and testified that the skill level of several of the lower class and younger players retained on the varsity squad was less than

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that possessed by the petitioner and several of the cut or nonselected players. Petitioner testified that senior class players who abided by the team rules had never been cut by the varsity squad in four previous years, to the best of his knowledge.

In sum, the petitioner makes the following contentions. First, the athletic director, in administering the Montgomery soccer program, acted wrongly and contrary to the policy of the Board in excluding the petitioner from the program. Extracurricular activities in athletics should be made available to all students and it is the desire of the Board to have a broad extracurricular activities program. There was no authority for the director to impose additional eligibility criteria or to require other rules or practices that exclude qualified students from participation in the soccer program. The director did not abide by and implement the Board's stated policy. Rather, he engaged in exclusionary practices.

The respondents offered no evidence to indicate or prove that the Board's policy was other than to make the soccer program available to all qualified students and to encourage participation in the program. The respondents seem to rely on the theory that the athletic director has the inherent authority to impose exclusionary practices. The respondents offered no evidence that such practices are reasonable, necessary or proper.

Second, the athletic director, in administering the soccer program, wrongly and unfairly restricted the opportunity of the petitioner to participate in the program in comparison to opportunities offered to other students. It is uncontested that the athletic director enforced rules that permit freshman class players to compete for and to play on the freshman, junior varsity and varsity teams. Sophomores and juniors may play on the junior varsity and varsity teams. Seniors, however, are limited to compete for and play on only the varsity team. Further, a senior player cut from the varsity team is excluded from the soccer program, while a junior, for example, may then play on the junior varsity team.

In 1985, six qualified players were cut from the varsity team in September. Five seniors were excluded from the program while one junior was permitted to play on the junior varsity team. On the basis of these rules and practices, a player from a lower grade had a greater opportunity to participate in the program than did seniors. The respondents offered no evidence indicating that such unequal and exclusionary rules are

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reasonable, proper or necessary under the circumstances of the Montgomery program or that they are supported by NJSIAA rules or that such is the common practice of similar schools. It is obvious to the petitioner that unequal opportunity afforded to students on the basis of grade level, in reality of a student's age, is contrary to Board policy, NJSIAA rules, legislation governing education and the New Jersey Civil Rights Act, N.J.S.A. 10:5-4 et seq.

Third, the athletic director, in selecting students to participate on the varsity team, favored younger players and thereby wrongly discriminated against the petitioner on the basis of age. The petitioner testified that the athletic director and coach had announced to all the players on the varsity squad on two occasions during the pre-season practice that, "There are too many seniors on this team." The respondent admits he said this but explains that he meant he was not obliged to follow the former practice of retaining all seniors on the varsity team. Petitioner testified that he interpreted the director's statement as meaning that Webb wanted younger and lower-grade players on the team so that the team would be stronger in future years.

After the petitioner was nonselected, the athletic director told him that even if the petitioner were retained on the squad, he probably would not play because the director wanted to play the younger players to give them experience.

The petitioner also testified that the department's practice over many years in selecting players for the varsity team was to include all senior class players and to supplement them with skillful juniors.

The petitioner urges that the coach's words, when he spoke of senior players, characterized his players by grade and age, not by skill level.

Fourth, the athletic director, administering the Montgomery soccer program, adopted and applied exclusionary practices which were unreasonable, arbitrary and capricious, and which were contrary to existing practice and not known to the students and, hence, a violation of due process. The team selection criteria employed by the athletic director and coach were not published in the Student Handbook or otherwise known to the students. Application of these practices in September 1985 was inconsistent with the practices followed by the school and known to the players and students for many prior years.

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The athletic director and coach has stated in a letter dated September 16 (P-11), and confirmed in his testimony, that the selection criteria are subjective with each coach and depend upon the particular sport. In the petitioner's view, such standards are inadequate to satisfy the due process requirements.

In Smith v. NJSIAA, 3 N.J.A.R. 193, where NJSIAA's standards were found to be inconsistently applied, the administrative law judge stated at 202-203:

> For the sake of basic fairness, the NJSIAA has an obligation to "... let the standard be generally known as to assure that it is being applied consistently and so as to avoid both the reality and appearance of arbitrary denial of benefits to potential beneficiaries." Morton v. Ruiz, 145 U.S. 199, 231 (1973). Our State's highest court has cautioned that ad hoc determinations made without "pre-existing, properly published and adequately defined standards" are inherently arbitrary. Robinson v. Cahill, 69 N.J. 449, 520 (1976).

Accordingly, the petitioner urges a finding that the criteria, standards and practices employed in the administration of the soccer program are subjective, not written or published, inconsistent and substantially different from those in effect in prior years. They are, in short, arbitrary.

Fifth and last, the athletic director's rules and exclusionary practices in administering the soccer program cannot be explained or justified on the basis of the inherent authority afforded an athletic director and coach. The inherent authority of an athletic director and coach to organize and administer an athletic program and team is not at issue in this case. The exclusionary practices complained of are not matters which are within the scope of proper authority of the athletic director at Montgomery under the circumstances. In respect to coaching a team, the issues of deciding which players will play in the games, what position on the team each will fill, how the practices will be run and similar matters of control and administration are not disputed by petitioner. In respect to the normal authority of an athletic director to determine budgets, plan game schedules and the like, the petitioner does not contest that the respondent possessed such authority. However, petitioner does claim that the exclusionary practices for which the respondents are responsible are not of this kind or nature, but are practices clearly contrary to the program established at Montgomery by the Board. They are improper also when measured against legislative standards and fail to satisfy the common fairness standard of the due process standard.

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The only explanation offered by the respondents for the exclusionary practices was that the coach, in his discretion and authority, thought they produced a better team. No evidence was offered to explain what benefit to the team was achieved by excluding five qualified and experienced senior class players, or what problems were avoided, or that alternatives to excluding the players from the program were considered or proposed.

The superintendent did not testify as to the goals or limitations of budgets and other possible forces that would explain the action taken. The respondents have based their action solely on the grounds that their actions are discretionary and no further explanation will be provided. The evidence is overwhelming that the respondent athletic director perverted the soccer program envisioned by the Board.

The respondents argue that the soccer program in Montgomery predates G.O.'s participation. The head soccer coach and athletic director for more than 15 years testified that student participation in the program has varied over the years. In earlier years, more students tried out for the team than there were places and cuts were made. For several years prior to the fall of 1985, there were approximately the same number of applicants (or less) than the available places on the teams and no cuts were made. G.O. happened to have been in the soccer program during both the lean years of few participants and the increase in participants in 1985.

While the parties disagree on the law, there are few material differences on the facts. G.O. recounted his interest in soccer and his experience on the freshman and junior varsity teams. His problem, however, arose in his senior year when, as a 17-year-old, he tried out for the team and was not selected. Several other seniors and several lower classmen also were nonselected.

G.O. asserts he was cut because he was a senior. In support of this, he referred to comments made by the coach during tryouts to the effect that there were too many seniors on the team and to a statement by the coach, made after the nonselection, that even if G.O. had not been cut, he would not have played much because the coach would have wanted to bring along the underclassmen.

The athletic director and coach acknowledged that he made a comment during tryouts concerning the number of seniors. He explained that the statement was prompted by the seniors' lassitude on the field, which he believed was due to their belief that they

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would automatically be selected. The coach sought to dispel this notion by reminding them that there were several qualified sophomores and juniors. The coach testified that he selected 18 varsity team members based upon his determination of the skill and ability of each player and their performance as a unit. He denied the relevance or intrusion of any other factors in selecting his varsity team.

Because G.O. was a senior, he was not permitted to play on the lower level teams such as junior varsity or freshman. At the hearing, the petitioner expended much effort on the issue of G.O. being excluded from the junior varsity team because he was a senior. However, the petition of appeal does not seek any relief regarding the junior varsity team and G.O.'s participation on that squad should not be an issue here.

The prohibition of seniors in playing on the junior varsity team was issued by the athletic director and head coach of soccer. There are several soccer teams in the school district, beginning with the seventh and eighth team. Seventh and eighth graders can play on a combined team. Freshmen can play on a freshman team, the junior varsity or the varsity. Tenth and eleventh graders can play on the junior varsity or varsity. Seniors can play on the varsity team only. The most able and cohesive players are selected from the whole group to form the varsity team. The next most able of the sophomores and juniors are selected for the junior varsity team. These procedures for selection were followed in all previous years and in the 1985 season. G.O. participated in and benefited from the experience of these teams and procedures in his school years prior to 1985. In 1985, these rules acted to his detriment and he initiated this suit. It is the coach's position that the procedures he followed were rational, legal and nondiscriminatory. Further, the coach should be awarded attorney's fees under N.J.S.A. 10:5-21.7 because the petition was groundless, frivolous, and, if not brought in bad faith, was certainly continued in bad faith after the injunction was denied.

The respondents argue that a local board of education has the authority to formulate its athletic program and to delegate to the administrative staff, director of athletics and team coaches the development of policies for each component of the program, subject to the statutory requirements for health, safety, academic standing, physical condition and nondiscrimination. This tribunal should uphold the respondents' action in not placing G.O. on the varsity team because the respondents acted on the basis of valid criteria, in accordance with Board rules and in accordance with all applicable

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state laws and regulations. Simply put, the coach, in selecting the 1985 squad did not act in an arbitrary or disciminatory fashion.

Preliminarily, the respondents argue that the petitioner appears to be operating under a misconception that the respondents bear the burden of proving that their action was reasonable and ligitimate. Thus, for example, at page 14 of the petitioner's brief, he decries the respondents' failure to prove that the Board's policy was other than to make the soccer program available to all qualified students; at page 15, petitioner claims the respondents failed to show that the coach's rules were reasonable or followed in other school districts; at page 16 the petitioner asserts that the respondents offered no proof that their exclusionary rules were reasonable or consistent with NJSIAA rules or followed by other schools, and, at pages 19 and 21, the petitioner repeats that the respondents failed to justify their act as reasonable and proper.

However, the respondents do not bear the burden of establishing the propriety of their act. Rather, the petitioner must shoulder the burden of proving that the respondents acted improperly and illegally. R.P and F.P. v. South Plainfield Bd. of Ed., 1978 S.L.D. 135, 137; Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). The petitioner has not met the affirmative burden here.

The petitioner cites to no authority for the proposition that a senior - or any grade or age student - has a right to be on a varsity soccer team where Board rules do not so require. The absence of supporting authority is not surprising. The case law clearly holds that there is no right to participation in cocurricular activities. Larry and Arline Dennis v. Holmdel Bd. of Ed., 1977 S.L.D. 388. As the Commissioner made plain in Dennis, participation in sports at public schools "is a privilege," not a right. Id. at 390. It is within this legal context that the petitioner's claims must be examined.

If G.O. has no legal right to be on the varsity soccer team, then any claim to play which he may possess must be predicated upon a showing of arbitrary or unlawful conduct by the respondents. No such showing has been made here.

First, even G.O. admitted on the stand that it is valid for a coach of a varsity team to select players on the basis of ability. That is precisely, and only, what was done here. The coach observed the students during the two weeks of tryouts and selected the

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most able and cohesive group of players. These 18 players, who were seniors, juniors and sophomores, were selected solely on the basis of their individual skills and their skills viewed in conjunction with the remaining members so as to create a well-rounded, competitive team. These factors are not only patently sound on their own, but they are also deemed rational by G.O.

The petitioner's next argument and ultimate position is that the Board's rules and policies and the education laws promote cocurricular activities and emphasize that such activities be available to all eligible students. Therefore, the petitioner asserts that G.O., who met the general eligibility requirements (see P-5), has a right to be on the team. Indeed, the district does wish to encourage participation by students in a wide variety of cocurricular activities, including, but not limited to, sports. But the fact that all these programs and activities are "available" to "eligible" students does not mean that any student has a "right" to be on any team, in any organization or in any activity he or she chooses. It means only that a student who satisfies the eligibility criteria may seek to be on the team or in the organization. In short, Board rules and policies guarantee an opportunity to be on a team but they do not guarantee a place on the team or in an organization, regardless of a student's ability or skills. By analogy, the respondents argue that a school newspaper has a right to turn away those who cannot write just as a soccer team may reject those "eligible" students who cannot run. If G.O. believed he had a right to be on the team simply because he was eligible as defined in P-5, then why did he have to report to tryouts? Neither the Board policies nor education laws give G.O. the right to be on a team simply because he is a student or a senior.

The petitioner also argues that the respondents' action must be deemed arbitrary and unlawful because the respondents offered no proof that the coach's procedures are followed in other school districts or that they are consistent with NJSIAA rules. Putting aside the petitioner's misplaced notion of which party bears the burden of proof, the fact is that the respondents offered ample and unrebutted evidence as to both issues. The NJSIAA officer testified that most other school districts also had cutting procedures and also forbade seniors from playing on junior varsity teams, and that these practices are not contrary to any NJSIAA rules. The officer also testified that if districts were required to allow all seniors who tried out to be on a varsity team, it would wreak administrative and economic havoc on the school system. In addition, the respondents placed into evidence a completed form (R-1) from a coach in another district, confirming that his school cut less skilled players and barred seniors from junior varsity teams. The

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form on which this information appears is in a letter and inquiry sent by the petitioner. It is incredible that the petitioner totally ignored his own document and the NJSIAA official's testimony. The testimony in evidence in this case contains strong and probative evidence that the respondents' conduct was consistent with the majority of other schools and not in any manner contrary to NJSIAA rules. It was the petitioner, not the respondents, who failed to produce evidence on this issue.

In this case, the claim of age bias is premised on the petitioner's belief that certain statements made by the coach suggest he was biased against seniors. G.O. testified at the injunction hearing that there were several age levels within each grade. Thus, there were juniors ranging from 15 to 17 years of age and seniors ranging from 16 to 18 years of age. Accordingly, to refer simply to "seniors" in relation to "juniors" does not show an age bias. However, as the coach explained at hearing, these comments were intended to prod the seniors into competitive workouts. In order for these otherwise innocent comments to constitute evidence of age discrimination, the petitioner must show that Webb intended them to mean what the petitioner claims he meant and that age made a concrete difference in the coach's decision, despite the powerful evidence that his decision was based solely on ability.

There is absolutely no basis to the petitioner's claim of age discrimination under N.J.S.A. 10:5-4. No excuse exists for the offensive misuse of that law in this case. Accordingly, respondent Webb requests this tribunal to exercise its discretion under N.J.S.A. 10:5-27.1 and award attorney's fees against the petitioner. Even if this suit was not brought in bad faith, bad faith began when the petitioner insisted on a plenary hearing after the injunction was denied. Cote v. James River Corp., 761 F. 2d 60 (1st. Cir. 1985) (in civil rights case, circuit court awarded defendant attorneys' fees even though suit was not filed in bad faith, where plaintiff continued with suit after being alerted by defendant that suit was untimely); Skrobacz v. International Harvester, 582 F. Supp. 1192 (N.D. Ill. 1984) (court awarded attorneys' fees to defendant after date it became clear that plaintiff would fail but plaintiff continued to litigate). The respondents maintain that the petitioner's action represents an offensive abuse of the civil rights laws and was founded on a frivolous premise. Teaching staff members should not be called before tribunals, frivolously charged with vacuous civil rights claims and forced to successfully defend themselves without recompense. At the very least, the petitioner should be ordered to pay the attorneys' fees incurred after the injunction was denied.

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DISCUSSION AND DETERMINATION

Although the parties' arguments are wide-ranging, there is only one issue in this matter. The issue is whether the nonselection of G.O. to the 1985 Montgomery High School boys' soccer team was arbitrary, capricious or otherwise improper.

The various documents, P-1, P-2, P-4 and P-5, all speak in general terms of the desirability and benefits of cocurricular, including athletic, programs. The Student Handbook, P-2, the NJSIAA rules and regulations, P-4, and the Board policy on eligibility, P-5, all express the criteria for eligibility for cocurricular activities. These three documents also set forth more specific eligibility requirements for athletics. It is apparent that the Student Handbook (P-2) echoes the NJSIAA rules and regulations (P-4) in that regard. It is undisputed that the NJSIAA rules and regulations are adopted as a board's own when a board joins the association pursuant to N.J.S.A. 18A:11-3.

For clarity's sake, it should be borne in mind that the words "cut" and "nonselection" are not synonymous, although often used as if they were. Nonselection, as the ordinary meaning of the word implies, applies to a situation in which one tries out for a team but is not selected to be on the team. Cut, on the other hand, usually means the dropping or elimination from a team of one who has previously been selected to play on it. G.O. was nonselected to the 1985 varsity soccer team. He was not cut from that team because he never had been on it.

Eligibility for a team or for any cocurricular activity is not the same thing as a right to be on the team or in the particular activity. A decision to exclude a pupil from participation on a team will be upheld unless shown to be arbitrary, capricious or unreasonable. Brown v. Piscataway Bd. of Ed., OAL DKT. EDU 0456-81 (July 16, 1981) adopted, Comm'r of Ed. (Aug. 18, 1981).

The coach testified that the eliminated players had a lower skill level than the retained players. G.O. disputes this and testified that the skill level of several of the lower-grade players retained on the varsity squad was not as good as that possessed by him and other eliminated players. G.O. also testified that senior-class players who abided by the team rules had never been cut from the varsity squad in four previous years.

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Testimony, to be credible, must inspire belief through its substantive content and the demeanor of the witness. A trier of fact may reject testimony because it is inherently incredible, or because it is inconsistent with other testimony or with common experience, or because it is overborne by other testimony. Congleton v. Pura-tex Stone Corp., 53 N.J. Super. 282, 287 (App. Div. 1958). Here, the coach's testimony is inherently more credible than that of G.O., is more consistent with common experience and weighs more heavily than that of G.O. Whether senior players had been cut or nonselected in four previous years is immaterial. The earlier, credible testimony of the coach that fluctuations in the numbers of young men trying out each year affected the numbers assigned to teams is worthy of belief and is "in all human likelihood" the fact. Loew v. Union Beach, 56 N.J. Super. 93, 104 (App. Div. 1959). G.O.'s testimony that he was not told why 18 persons were selected for the varsity team must be dismissed similarly. There is absolutely no requirement that he be told. Such judgment rests in the sound discretion of the coach. Brown.

Testimony adduced by the petitioner, not summarized above, concerning the number of playing fields, layout of the fields and number of coaches also is rejected as immaterial. While a shortage of facilities and staff might dictate curtailment of a program, the converse is not automatically true. Nothing I can find in case law - or common sense, for that matter - indicates that a board must expand cocurricular activities simply because it has some of the means to do so. Any activity bears a cost. A board has not merely a right but an obligation to examine activities, determine a point of diminishing return for each and be guided by those determinations.

The testimony of the NJSIAA officer that a no-cut policy is not tantamount to the participation of all players is convincing and reasonable. His testimony that districts with no-cut policies usually have few candidates for teams also is inherently credible. No doubt, exceptions can be found. However, the officer's testimony was as to the usual case.

G.O. also testified that the athletic department's practice over "many years" in selecting players for the varsity team was to include all senior class players and to supplement them with skillful juniors. Never, in petitioner's experience, was a qualifed senior player cut from or nonselected to the varsity team. There is nothing inconsistent here with the coach's entirely credible testimony that fluctuations in the numbers of young men trying out dictated certain decisions as to how teams would be made up in a

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given year. It appears that G.O.'s experience at Montgomery High School coincides with a period of relatively low turnouts. Under such circumstances, few if any persons were cut. This does not establish a no-cut policy. The coach also testified that when numbers were low, in order to keep the freshman team going, he directed the junior varsity coach to take no freshmen or a limited number of freshmen. When numbers are more sufficient, freshmen with ability are allowed to move up to the junior varsity and, in exceptional cases, the varsity team. This appears to be a reasonable exercise of coaching judgment.

The petitioner's argument that cuts and nonselections in 1985 were arbitrary, contrary to existing practice and not known to the students and, hence, a violation of due process must be rejected out of hand. The assertion rests on several presuppositions. First, as noted above, there was no no-cut policy in effect. What may have appeared to be a no-cut policy to G.O. during the three prior years was simply a function of relatively low turnouts. There was no prior or existing practice as such. It is also necessary to examine the rest of the assertion that this was "not known to the students and hence a violation of due process." There is no fine point of law here. No pupil of normal intelligence can believe that by setting foot onto the field or by virtue of having attained twelfth-grade status that he somehow has a right to participation that rises to a level at which a denial of participation would trigger due process rights. See, Lauster v. NJSIAA, OAL DKT. EDU 5346-83 (Aug. 11, 1983) adopted Comm'r of Ed. (Sept. 7, 1983).

Accordingly, the further argument that the standards and practices employed by the coach in the 1985 season were inadequate to satisfy due process requirements must be dismissed because there was no requirement of due process. The petitioner's reliance on Smith is misplaced. Smith was not a case involving coaching discretion. Rather, it had to do with inconsistent waivers by the association of the "eight-semester rule" that prohibits pupils from participating in interscholastic sports after the expiration of eight consecutive semesters following entrance into the ninth grade. The petitioner complains that the only explanation offered by the respondents for the alleged exclusionary practices here was that the coach in his discretion and authority thought they produced a better team. No evidence was offered to explain what benefit to the team was achieved (Petitioner's brief at 21). As the respondents properly point out, they have no duty to produce such evidence.

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In order to establish age discrimination in violation of N.J.S.A. 10:5-12(a), the complainant must present "satisfactory proof of discriminatory motive or intent." Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 30 (1981). Courts recognize, however, that:

> . . . discrimination is not usually practiced openly and that intent must be found by examining what was done and what was said in the circumstances. . . . [Parker v. Dornbierer, 140 N.J. Super. 185, 189 (App. Div. 1976).]

Because of the difficulty of proving discriminatory intent, our courts have adopted the rule set forth in McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973), that plaintiff can make a prima facie case of unlawful discrimination by showing:

> (1) she belongs to a protected class, (2) she applied and was qualified for the position for which the employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. Goodman, at 31.

Obviously, the elements of the prima facie case must be modified to fit the circumstances of the particular case under consideration. Peper v. Princeton University Board of Trustees, 77 N.J. 55, 83-84 (1978).

I reject the notion that the petitioner's allegations here constitute a prima facie case. However, even if they do, McDonnell-Douglas, instructs at 802 that all the respondent has to do to dispel the prima facie showing is to "articulate some legitimate nondiscriminatory reason" for its action.

The coach's clear and convincing testimony that he chose the players who, in his judgment, would contribute most to the success of the team is an articulation of a legitimate nondiscriminatory reason for his nonselection of G.O.

Having reviewed the entire record in this matter, I **FIND:**

1. The decision of the boys' varsity soccer coach not to select G.O. to the varsity team was a proper exercise of coaching discretion.

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2. The credible evidence shows that the nonselection decision was based on an assessment of G.O.'s skills and abilities vis a vis those of other young men trying out for the team and was not in disparagement of any claimable right.

3. Eligibility to try out for a team or any school activity is not coextensive with a right to participate on a team or in an activity.

Based on the factual findings and the case law, I **CONCLUDE** that there has been no abuse of discretion or violation of any civil rights on the part of the respondents. It has long been said by the Commissioner of Education and affirmed by the State Board of Education and the courts that:

> The School Law vests the management of the public schools in each district in the local boards of education, and unless they violate the law, or act in bad faith, the exercise of their discretion in the performance of the duties imposed upon them is not subject to interference or reversal. Kenney v. Bd. of Ed. of Montclair, 1938 S.L.D. 647 (1935) aff'd, St. Bd. of Ed. 649, 653 (1935).

And,

> It is not a proper exercise of a judicial function for the Commissioner to interfere with local boards in the management of their schools unless they violate the law, act in bad faith (meaning acting dishonestly), or abuse their discretion in a shocking manner. Boult and Harris v. Bd. of Ed. of Passaic, 1939-49 S.L.D. 7, 13, aff'd St. Bd. of Ed. 15, aff'd 135 N.J.L. 329 (Sup. Ct. 1947), 136 N.J.L. 521 (E. & A. 1948).

The petitioner's pleadings and arguments are undoubtedly heartfelt. Nevertheless, the record fails to show an abuse of discretion on the part of the respondents. Accordingly, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED.**

N.J.S.A. 10:5-27.1 provides:

> In any action or proceeding brought under this act, the prevailing party may be awarded a reasonable attorney's fee as part of the cost, provided however, that no attorney's fee shall be awarded to the respondent unless there is a determination that charge was brought in bad faith.

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In the present matter, although the petitioner's claims were unfounded, I stop short of finding them to be in bad faith. Brown v. Fairleigh Dickenson University, 560 F. Supp. 391 (D.N.J. 1983). The demand for attorney's fees is **DENIED**. It is so **ORDERED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

12 MARCH 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

MAR 1 2 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 17 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ml/EE

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H.O., for his son, G.O.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, CHARLES WEBB, ATHLETIC DIRECTOR, AND MALCOM D. EVANS, SUPERINTENDENT, SOMERSET COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner takes general exception to the ALJ's order, conclusions, findings and determination in the Initial Decision dated March 17, 1986 on the grounds that such are against the weight of the evidence and for more specific reasons set forth below.

1. Exception is taken to the determination that:

   a. the issue is whether the nonselection of G.O. to the soccer team was arbitrary (Initial Decision, ante). Rather, petitioner urges that the issue is whether G.O. has a right to participate in the program absent a proper basis for excluding him, and that Coach Webb's exclusionary rules are contrary to the Board's policy and hence unauthorized.

   b. the Montgomery soccer program as defined, published and practiced states only eligibility criteria (Initial Decision, ante). Rather, petitioner urges that the soccer program is a comprehensive funded school program in which G.O. has a right to participate under the circumstances.

   c. no consideration was apparently given by the ALJ to Coach Webb's practices which result in unequal opportunity among players of different classes.

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d. the capacity of Montgomery's soccer facilities to accommodate the excluded players is immaterial (Initial Decision, ante). Rather, petitioner urges that it is evidence of the broad purpose of the program and that Webb's practices are contrary to the Board's policy.

e. the practice of the Montgomery soccer program over the last four years to include all qualified senior class players does not establish a no-cut policy (Initial Decision, ante). Rather, petitioner urges that when such practice is considered with the organization, written definition, and publication of the program, such is convincing evidence that the program did extend to G.O. and the other excluded players.

2. Exception is taken to the apparent failure of the ALJ to consider Coach Webb's rules which resulted in unequal opportunity among classes, e.g., lower class students could play on any one of three teams according to ability while senior class players could only play on the varsity.

3. Exception is taken to the determination that petitioner's allegations do not constitute a prima facie case of age discrimination (Initial Decision, ante) and that the coach's statement that selected players would contribute most to the success of the team was a sufficient reason to overcome petitioner's case on this point (Initial Decision, ante). Rather, petitioner urges that the coach's statements and the actual results were overwhelming evidence of discrimination and unequal opportunity afforded G.O. and four other seniors. Petitioner also asserts that the ALJ wrongly excluded from evidence the Montgomery student newspaper which included Webb's discriminatory statement and wrongly refused to permit petitioner to testify to statements made by the author of the article. Petitioner asserts that the newspaper was properly authenticated, and the proposed testimony was allowable hearsay because the OAL rules permit hearsay statement; the statement confirmed what the newspaper stated in print; and the ALJ allowed into evidence exhibit R-1, which was unsupported hearsay, over the objection of petitioner. (Tr.25 and Petitioner's Reply Brief, at p. 10)

4. Exception is taken to the determination that there is no no-cut policy in effect, that no student would believe that he has a right to participate that rises to the due process level and that there was no requirement for the coach to explain why petitioner and others were excluded from the program. (Initial Decision, ante) Petitioner asserts that Coach Webb perverted the

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program defined by the Board with practices which were subjective, inconsistent, unknown to the students and contrary to the school policy, and that Webb's enforcement of these practices deprived G.O. of his right as a student participant.

Petitioner avers in exceptions that, as the moving party in this matter, he has the burden of persuasion to convince the Commissioner that by a preponderance of the evidence he is entitled to the relief sought. However, petitioner believes that because he has established at least a prima facie case of

1. age discrimination and

2. the right of a student under the Montgomery program to participate in an available school program,

the burden of going forward with evidence to justify such practices has shifted to respondents. Petitioner urges that respondents have failed to carry this burden on either issue, and hence, judgment should be given for petitioner.

> In conclusion, petitioner asserts, If all four issues asserted by Petitioners are synthesized into one it would be whether the unequal, inconsistent and subjective administration of an available school program defined as one that "should be made available to all students" (P-1) can be permitted to exclude five fully qualified, experienced and interested students solely on the grounds of "the perception of the varsity coach, Mr. Webb, as to the best circumstances for the whole team". Obviously the answer is that students cannot properly be excluded from an available school program on such a basis, and hence, the relief sought by the Petitioners is proper and appropriate, and should be granted as requested. (Petitioner's Exceptions, at p. 14)

Petitioner's Exceptions include a copy of and references to Petitioner's Reply Brief and two transcripts of proceedings held on November 1, and December 13, 1985, all of which are incorporated herein by reference.

Upon a review of the record in this matter, the Commissioner is unpersuaded by petitioner's exceptions that the ALJ erred in determining that G.O. was not improperly excluded from participating in the Montgomery High School boys' varsity soccer team throughout the 1985 season for the following reasons.

Initially, the Commissioner concurs with two points raised by respondents. First, New Jersey case law clearly holds that there is no right to participation in cocurricular activities. Larry and Arline Dennis v. Holmdel Bd. of Ed., 1977 S.L.D. 388 Participation

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in sports at public schools is a "privilege", not a right. (at 390) Further, as noted by respondents, if there is no legal right to be on the varsity soccer team, or indeed any team, then any claim to play which a student may possess must be predicated upon a showing of arbitrary or unlawful conduct by respondents. (Respondent Webb's Post-hearing Prief, at p. 6) Where, as in the instant matter, there is a claim that nonselection for the varsity team was predicated solely on the age of the players and was thus an arbitrary abuse of discretion, the burden of proving that the respondents' actions were improper and illegal falls on petitioner. R.P. and F.P. v. South Plainfield Bd. of Ed., 1978 S.L.D. 135, 137; Thomas v. Morris Tp. Bd. of Ed., 89 N.J. Super. 327 (App. Div. 1965), aff'd 46 N.J. 581 (1966). The Commissioner agrees with the ALJ that petitioners have failed to make out a prima facie case of discriminatory motive or intent. See N.J.S.A. 10:5-12(a). See also Goodman v. London Metals Exchange, Inc., 86 N.J. 19, 30 (1981).

McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973) establishes the four-prong test for a prima facie showing of unlawful discrimination:

> ***(1) she belongs to a protected class, (2) she applied and was qualified for the position for which the employer was seeking applicants, (3) despite her qualifications she was rejected, and (4) after rejection, the position remained open and the employer continued to seek applications from persons of plaintiff's qualifications. Goodman, at 31.

Petitioner has failed to produce probative evidence of age discrimination as defined and prohibited by N.J.S.A. 10:5-4. As Respondent Webb suggests in his post-hearing brief

> G.O. is a 17 year old senior. That a 17 year old even raises an age discrimination claim is anathema, for the age laws were obviously intended to protect older Americans from the likes of G.O., a 17 year old. Indeed, under the federal analogue to the Law Against Discrimination, the protected class is those aged 40 and above. 29 U.S.C. sec. 621-634.
> (Respondent Webb's Post-hearing Brief, at p. 8)

Even acknowledging that the elements of the prima facie age discrimination case must be modified to fit the circumstances of the particular case under consideration, (Peper v. Princeton University Board of Trustees, 77 N.J. 55, 83-84 (1978)), the Commissioner still can find no protected class to which G.O. can claim membership when no student is entitled by law to participation in cocurricular activities and under circumstances where Board rules do not so require. Indeed, petitioner appears to argue that G.O.'s status as a senior equates with age discrimination. It does not. Further,

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the Commissioner is not persuaded that petitioner has proved a prima facie case that G.O., by virtue of his status as a senior, is entitled under the Montgomery program to participate in an "available school program" (Petitioner's Exceptions, at p. 13) since there is no entitlement to participation in cocurricular activities. "Eligibility to try out for a team or any school activity is not coextensive with a right to participate on a team or in an activity." (emphasis supplied) (Initial Decision, ante)

Had petitioner met his initial burden, which he has not, the burden would then shift. "Once the plaintiff succeeds in making a prima facie showing, the defendant must 'articulate' some nondiscriminatory reason for the action or privilege under one of the statutory exemptions. *** Once the defendant has articulated a justification, the defendant's burden is satisfied; the burden of persuasion never shifts to the defendant."[1]

The Commissioner again refers to respondent's brief for a cogent analysis of the shifting burden in an age discrimination case:

> In this case the claim of age bias is premised upon petitioners' belief that certain statements made by Webb suggest that he was biased against seniors. ***However, as Webb explained at the hearing, those comments ("There are too many seniors on this team") were intended to prod the seniors into competitive work outs. In order for these otherwise innocent comments to constitute evidence of "age" discrimination, the petitioners must show that Webb intended them to mean what the petitioners claim he meant and that age made a concrete difference in Webb's decision despite the powerful evidence that the decision was based solely on ability."
>
> (Respondent Webb's Post-hearing Brief, at p. 8 referring to Cebula v. General Electric Company, 39 FEP (BNA) 411, 417 (N.D. Ill. 1985)

The Commissioner is convinced that respondents have met their burden of proffering a legitimate, nondiscriminatory reason for their action, i.e., that the discretion vested in and exercised by the coach in selecting soccer team members from among the eligible candidates was entirely appropriate and reasonable. Petitioner's allegation that respondents failed in their burden and thus said failure requires that judgment should be given for petitioner is a clear misstatement of the law. The ultimate burden

[1] Schlei, Barbara Lindemann and Grossman, Paul, Employment Discrimination Law. Chicago: 1983 American Bar Association, pp. 499-500.

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of proof in age discrimination cases, including allegations of pretext, remains at all times with petitioner. See Smithers v. Bailar, 23 FEP 1197, 1203 (D.N.J. 1979, aff'd 629 F. 2d 892, 23 FEP 1206 (3d Cir. 1980). See also Schlei and Grossman, supra, at 500-504.

Consequently, the Commissioner affirms the findings and determinations of the ALJ for substantially the reason expressed therein. He finds, as did the ALJ, no bad faith in the filing of this Petition of Appeal, rather only a student's youthful zeal and a parent's sincerely held convictions. Thus, the demand for attorney's fees is denied.

The Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

April 28, 1986

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H.O., for his son, G.O.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MONTGOMERY, SOMERSET COUNTY, CHARLES WEBB, ATHLETIC DIRECTOR, AND MALCOLM D. EVANS, SUPERINTENDENT,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, April 28, 1986

For the Petitioner-Appellant, Harold S. O'Brian, Jr., Esq.

For the Respondent-Respondent Charles Webb, Zazzali, Zazzali and Kroll (Kenneth I. Nowak, Esq., of Counsel)

For the Respondent-Respondent Montgomery Township Board of Education, A. Dix Skillman, Esq..

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 3, 1986

Affirmed N.J. Superior Court June 29, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6316-85
AGENCY DKT. NO. 324-9/85

MARY REY,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,
Respondent.

Michael E. Buckley, Esq., for the petitioner (Dwyer, Canellis & Bell, attorneys)

Alfred D. Antonio, Esq., for the respondent (Antonio & Flynn, attorneys)

Record Closed: February 4, 1986 Decided: March 14, 1986

BEFORE **BEATRICE S. TYLUTKI, ALJ:**

This matter concerns the withholding of the petitioner's salary and adjustment increments for the 1985-86 school year by the Board of Education of the City of Perth Amboy (Board). Mary Rey requested a hearing and the matter was transmitted to the Office of Administrative Law for a determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

PROCEDURAL HISTORY

A prehearing conference was held on November 18, 1985, at which time the parties agreed that the issues in this matter are:

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A. Whether the Board acted in an arbitrary or unreasonable manner when it denied the petitioner's salary increment. Specifically:

(1) Whether the manner of conducting the evaluation of the petitioner's performance was prejudicial to her.

(2) Whether consideration was given to the petitioner's schedule in the evaluation process.

The hearing took place on February 4, 1986, at the Perth Amboy City Hall, and the record in the matter closed on that date.

FACTUAL FINDINGS

Ms. Rey is a tenured teacher who has been employed by the Board since the 1974-75 school year. From the 1977-78 to the 1984-85 school year, Ms. Rey was assigned to School No. 7 and while she was teaching at that school, Kenneth Campbell was the principal. From the 1981-82 to the 1984-85 school year, Ms. Rey was assigned to teach English as a Second Language (ESL) courses and for that period of time, Ralph Gunn, Director of the Bilingual Program, was her supervisor and evaluated her teaching performance.

As an ESL teacher, Ms. Rey was assigned ten classes a day, each for half an hour and each class had approximately six students. Since students cannot be left unattended, it is a school requirement that the ESL teachers pick up their students on time for each class.

Prior to the 1984-85 school year, Ms. Rey taught her classes in an alcove in the kindergarten classroom. Since additional teachers were hired for the 1984-85 school year, Mr. Campbell made changes in the classroom assignments and Ms. Rey and two other ESL teachers were not given a permanent place for their classes. These teachers were assigned to various rooms within the school for their classes, including the cafeteria and classrooms which were not in use when the regularly assigned teacher had a preparation and planning period. Ms. Rey stated that this arrangement made it difficult for her to teach and to be on time to pick up the students for her classes. During the

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school day, Ms. Rey used a number of classrooms and had to set up her material in each room without disturbing the regular teacher's material. When she was assigned to the cafeteria, Ms. Rey had to set up chairs for her class and her students were often distracted by other persons working in the cafeteria.

Prior to the 1984-85 school year, Mr. Gunn stated that he had critized Ms. Rey's teaching performance on a number of occasions. During the 1984-85 school year, Mr. Gunn observed Ms. Rey's teaching performance during several classes on both April 24, 1985 and May 9, 1985, and concluded that her performance had deteriorated (R-4, R-7, R-8). In general, Mr. Gunn felt that Ms. Rey was not following the program he had developed for ESL classes and was not meeting the minimum standards of instruction for the courses (R-4, R-7, R-8). Mr. Gunn stated that the school's ESL program consisted of different courses based on the grades of the students and that he observed Ms. Rey teach the same course during her classes even though the grades were different. Also, he noted that Ms. Rey's students were not doing as well as other ESL pupils in the school.

Mr. Gunn denied that the petitioner's schedule or the location for her classes had any adverse effect on Ms. Rey's teaching performance.

Also during the 1984-85 school year, a student was hit by another student while in Ms. Rey's class and Mr. Gunn transferred the student who was struck to another class at the request of the student's parents. According to Mr. Gunn, the petitioner did not exercise enough classroom discipline.

Ms. Rey did not directly challenge Mr. Gunn's comments regarding her teaching performance during the 1984-85 school year, but testified about factors which she felt had a negative bearing on her teaching performance (R-4). In addition to the problems associated with moving from room to room, Ms. Rey stated that during the April 24, 1985 classroom observations by Mr. Gunn, the students were excited since the California Achievement Test was being given in the school on that day. Mr. Gunn questioned what effect this test had on the students in the classes he observed since the students were too young to take this test. Also on April 24, 1985, Mr. Gunn observed a class that was taught in the cafeteria. Ms. Rey stated that the children were restless since she had to arrange the chairs before starting to teach and they were distracted during the class by the janitor who was mopping the cafeteria floor.

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As to Mr. Gunn's classroom observations on May 9, 1985, Ms. Rey stated that the students were excited that day since they had purchased items at the Mother's Day Bazaar and wanted to talk about what they had bought. Also, one of the classes observed by Mr. Gunn on that day was held in the cafeteria and the children were distracted by the people who were preparing the lunch. In his written report regarding his observations on May 9, 1985, Mr. Gunn noted that Ms. Rey was five minutes late picking up one of her classes (R-7).

Based on his observations, Mr. Gunn prepared a written evaluation of Ms. Rey for the 1984-85 school year in which he noted the need for improvement in the areas of planning and classroom preparation, techniques, delivery, classroom management, evaluation of students and organization (R-4).

Ms. Rey felt that more than one supervisor should evaluate her and that it was unfair for Mr. Gunn to make his classroom observations at the end of the school year since there was insufficient time for a teacher to show any improvement prior to the time the supervisor submitted a recommendation regarding the following year's salary and adjustment increments. In response, Mr. Gunn noted that he had criticized Ms. Rey's teaching performance in previous school years, had offered suggestions for improvement and that his suggestions had not been implemented by Ms. Rey.

As to the question of Ms. Rey's punctuality during the 1984-85 school year, Mr. Campbell stated that he recognized that there would be a problem during the school year since Ms. Rey and two other ESL teachers did not have a permanent location for their classes. Mr. Campbell tried to minimize this problem when he prepared the classroom schedule and he met with the affected ESL teachers on several occasions and verbally stated that after each 25-minute ESL class, the ESL teachers had five minutes between classes to move their material and pick up their students promptly on the hour and on the half hour for the next class. Mr. Campbell thought five minutes was sufficient time since the school was small.

After Mr. Campbell received complaints regarding the late pickups of students, Mr. Campbell and Mr. Gunn jointly sent a memorandum to Ms. Rey dated November 12, 1984, which affirmed that there was a five-minute period between classes (R-11). Since there was continued confusion regarding the schedule for the ESL classes,

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the ESL teachers were required to use schedule forms (P-2) and the regular classroom teachers were given forms for the purpose of reporting any problems as to the schedule for the ESL classes (P-3).

Ms. Rey denied that she was given a five-minute period between classes before January 1985, and she stated that a five-minute period was insufficient time. Also, Ms. Rey stated that the special complaint forms (P-3) were given to the regular classroom teachers for use only about her activities.

Frank M. Sinatra, the Superintendent of Schools, testified that he was aware of the problem regarding the pickup of ESL students at School 7 during the 1984-85 school year and that the special forms (P-2, P-3) were developed at his suggestion to correct the problem.

In addition, Mr. Sinatra stated that he spoke to Ms. Rey about her teaching performance sometime in November 1984. In December 1984, he wrote Ms. Rey requesting that she meet with him after he received a complaint regarding the incident involving the student who was hit by another student, and regarding her adherence to the ESL program (R-9). He met with Ms. Rey and Mr. Gunn in January 1985.

In April 1985, Mr. Sinatra wrote Ms. Rey requesting that she meet with him after he received an oral complaint from a teacher regarding Ms. Rey's teaching performance. The petitioner did not respond to this letter or the follow-up letter sent by Mr. Sinatra. After Mr. Sinatra sent a third letter to Ms. Rey, the meeting took place on May 21, 1985. In addition to Ms. Rey and her union representatives, both Mr. Campbell and Mr. Gunn attended the meeting.

After this meeting, Norman R. Tankiewicz, District Representative of the Perth Amboy Federation of Teachers, wrote Mr. Sinatra and made a number of suggestions (P-15). Mr. Tankiewicz suggested that Ms. Rey be transferred to another school, that no disciplinary action be taken against Ms. Rey as a result of the alleged deficiencies contained in the 1984-85 evaluation, and that Ms. Rey be given a revised professional improvement plan (P-1). Also, Mr. Tankiewicz objected to the fact that Mr. Gunn had observed a number of classes during a single school day (P-1).

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In response, Mr. Sinatra stated that he would consider transferring Ms. Rey to another school and would consider the other recommendations contained in Mr. Tankiewicz's letter (R-10). For the 1985-86 school year, Ms. Rey was transferred to another school and was assigned to teach Basic Skills courses.

By letter dated June 17, 1985, Ms. Rey was informed that Mr. Sinatra would be recommending the withholding of her salary and adjustment increments for the 1985-86 school year and that she could discuss the matter with the Board (R-1). At its meeting of June 20, 1985, the Board voted that the salary and adjustment increments for Ms. Rey be denied (R-2), and on June 27, 1985, Ms. Rey was informed of the Board's decision (R-5).

I **FIND** that the facts as stated above are not in dispute except for the testimony as to when Ms. Rey was told she had five minutes between classes and the use of the teacher complaint forms (P-3).

Based on the testimony and exhibits, I accept the statements made by the Board's administrators and I **FIND** that Mr. Campbell intended that the ESL teachers have five minutes between classes and that any confusion should have been clarified by the memorandum and the meetings held during the early part of the 1984-85 school year. Also, I **FIND** that there was no acceptable reason given for Ms. Rey to be late for her student pick-ups after the clarification regarding the five-minute periods. In addition, I **FIND** that the forms (R-3) given to the regular classroom teachers were for use regarding all ESL teachers who did not have a permanent location for their classes.

CONCLUSIONS OF LAW

Pursuant to N.J.S.A. 18A:29-14, a board of education may withhold a salary or adjustment increment for "inefficiency or other good cause."

In this matter, Mr. Michael E. Buckley, Esq., on behalf of the petitioner, argued that the Board did not have any good cause for the withholding of Ms. Rey's salary and adjustment increments for the 1985-86 school year. He further argued that the classroom observations on which Mr. Gunn based his evaluation were conducted under difficult circumstances due to the fact that she was not assigned a permanent location for her classes. Alfred D. Antonio, Esq., on behalf of the respondent, disagreed and argued that the Board had justifiable reasons for the withholding of Ms. Rey's increments.

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It has been consistently held in this state that a Board has the discretionary right to withhold salary increments pursuant to N.J.S.A. 18A:29-14, and that its decision will be upheld unless it is "patently arbitrary, without rational basis or induced by improper motives." Kopera v. West Orange Board of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). Based on the facts in this matter, I **CONCLUDE** that the petitioner has not shown that the Board's decision regarding her salary and adjustment increments was either unreasonable or arbitrary, and further, that there was no evidence to show that this decision was induced by any improper motives. The facts clearly establish that Mr. Gunn was dissatisfied with Ms. Rey's performance for a number of years and based on his classroom observations, he concluded that Ms. Rey's performance had deteriorated rather than improved during the 1984-85 school year. Although I recognize that there was a problem involving the scheduling of the five minutes allowed between ESL classes, I am satisfied, based on the testimony of the Board's administrators, that this problem was resolved by the end of 1984, and that it should not have affected Ms. Rey's performance in April and May 1985, when she was observed by Mr. Gunn. Further, although teaching at various locations made it more difficult for Ms. Rey to set up her classes, I recognize that most of the criticisms voiced by Mr. Gunn related to her presentation and teaching techniques and material which have nothing to do with the locations for her classes.

DISPOSITION

Based on the above, I **CONCLUDE** and **ORDER** that the denial of the petitioner's salary and adjustment increments for the 1985-86 school year be **AFFIRMED**.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 14, 1986
DATE

BEATRICE S. TYLUTKI, ALJ

MAR 17 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 18 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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MARY REY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PERTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and recommended decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon examination of the record in this matter, the Commissioner adopts the recommended decision of the Office of Administrative Law for the reasons expressed therein.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5187-85
AGENCY DKT. NO. 282-8/85

E.B., an infant by her parent and guardian ad litem, S.B.,
Petitioners,
v.
NORTH HUNTERDON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND ROBERT HOPEK,
Respondents.

Anne P. McHugh, Esq. (Pellettieri, Rabstein and Altman, attorneys) and **P. Kay McGahen,** Esq. (McGahen, Dempsey & Casey, attorneys) co-counsel for petitioners

James P. Granello, Esq., for respondent (Murray & Granello, attorneys)

Michael J. Herbert, Esq., for intervenor, New Jersey State Interscholastic Athletic Association (Sterns, Herbert & Weinroth, attorneys)

Paula A. Mullaly, General Counsel, amicus curiae, New Jersey School Boards Association (Cynthia J. Jahn, Assistant Counsel, on the letter memorandum)

Record Closed: March 1, 1986 Decided: March 14, 1986

BEFORE **DANIEL B. MC KEOWN, ALJ:**

PROCEDURAL HISTORY AND BACKGROUND FACTS

On August 16, 1985, S.B., on behalf of her daughter E.B., filed a Verified Petition of Appeal before the Commissioner of Education by which it was alleged the

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Board and its athletic director, Robert Hopek denied E.B. the opportunity to try out for the boys' high school football team on the sole basis of sex. It was alleged that such denied based solely on sex is a violation of N.J.S.A. 18A:36-20, the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the New Jersey Constitution (1947), Article I, Section 1, 20 U.S.C. ¶ 1681, Title IX of the Educational Amendments of 1972 and the regulations promulgated thereunder at 45 C.F.R. s.106.41 (now codified at 34 C.F.R. s.106.41), and her civil rights under 42 U.S.C. 1983.

In addition to other relief requested including counsel fees, petitioner sought a temporary restraining order to prohibit the Board from denying her the opportunity to qualify by medical examination and try out for the team then scheduled for its first meeting on August 24, 1985. The Commissioner of Education immediately transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. and N.J.S.A. 52:14B-1 et seq. Oral argument on a motion for a temporary restraining order was heard August 19, 1985. A written Order, subject to the Commissioner's review, issued August 20, 1985, a copy of which is attached hereto and incorporated herein as if set forth in full. That Order provides in relevant part:

> Accordingly, petitioner's application for interim relief in the form of a restraining order by which the Board, its agents, officers and employees and all others who have direct personal knowledge of this Order to prohibit them (sic) [would be prohibited] from denying petitioner the opportunity to compete, try out and qualify for membership on the North Hunterdon High School football team is hereby GRANTED. The North Hunterdon Board of Education is specifically DIRECTED to immediately arrange for E.B. to be physically examined by the school medical inspector for a determination on her fitness to participate on the high school football team and it is further DIRECTED, upon the presumption E.B. is physically fit, to ensure that she receives football equipment in the same manner as do male football players on Saturday, August 24, 1985. The Board is further DIRECTED to ensure that its athletic director and head football coach, and assistant football coaches and all employees under its charge do nothing to prevent E.B. from participating in actual football practice which is to commence on Monday, August 26, 1985. Such interim relief shall remain in effect until and if the Order is vacated at the close of the plenary hearing which is to commence on September 9, 1985.

The Commissioner immediately called the record up for review and on August 22, 1985 held:

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> The Commissioner therefore adopts the recommendations of the administrative law judge and makes them his own. The Northern Hunterdon Regional Board of Education is therefore directed to immediately take those steps necessary to permit petitioner [E.B.] to participate in full equality and opportunity with all other individuals seeking to play football in the district schools. Further hearings as required in this matter may continue as directed by the ALJ.

The initial pleadings in the case make no reference to the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. Nonetheless, when the initial Order issued on August 20, 1985, the following statement was made following a discussion of relevant parts of the New Jersey Constitution (1947), N.J.S.A. 18A:36-20, N.J.A.C. 6:4-1.5 and court opinions:

> While not argued nor relied upon by petitioner in her moving papers, I would be remiss not to mention the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. The fact that the Verified Petition and the application for interim relief was brought under Education Law, the Commissioner and the Director of the Division on Civil Rights have concurrent jurisdiction of discrimination complaints involving public schools. Jamison v. Bd. of Ed. of Rockaway Tp., 171 N.J. Super. 549 (App. Div. 1979). The legislative policy underlying the Law Against Discrimination is stated at N.J.S.A. 10:5-3 and is fully consistent with the cited provisions of our State Constitution and N.J.S.A. 18A:38-20 and N.J.A.C. 6:4-1.5
> * * *

The Board elected not to oppose E.B.'s participation on its boys' high school football team after the Commissioner's ruling. A copy of an executed Consent Order to that effect is attached hereto and incorporated herein as if set forth in full. The sole issue which remains is whether the Commissioner of Education has authority to award counsel fees and costs in the matter and, if so, whether counsel fees in the amount of $9,882.50, plus costs in the amount of $133.37, should be assessed against the Board in favor of petitioner. It is noted that at all times material herein petitioner was represented by volunteer counsel through the American Civil Liberties Union of New Jersey (ACLU-NJ), Anne P. McHugh, lead counsel in this case and a partner in the Trenton law firm of Pellettieri, Rabstein & Altman. Ms. McHugh was assisted by co-counsel of record, P. Kay McGahen, a senior partner in the Trenton law firm McGahen, Dempsey & Casey. It is represented that both counsel were assisted in their efforts on behalf of E.B. by Deborah H. Karpatkin, salaried staff counsel for ACLU-NJ. It is further

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noted that throughout the entire litigation of this matter petitioner suffered no out-of-pocket expense for counsel fees. Accordingly, counsel fees, if awarded, would be tendered ACLU-NJ for use in its Civil Liberties Education and Action Fund to support future ACLU-NJ litigation.

After the Board agreed in principle not to oppose E.B.'s participation on the team, E.B. moved to amend the initial pleadings to include an allegation that the refusal of the Board and of its athletic director to allow her to participate on the team was based on her sex, female, and the refusal based on sex constitutes unlawful discrimination under N.J.S.A. 10:5-1 et seq. It is noted that the Law Against Discrimination vests the Director of the Division on Civil Rights with authority to award a reasonable attorney's fee as part of the costs to the prevailing party in an action brought under that law. N.J.S.A. 10:5-27.1. There is no similar statute under Education Law, N.J.S.A. 18A:1-1 et seq., authorizing attorney's fees to be awarded by the Commissioner of Education to prevailing parties in Education Law disputes.

ARGUMENTS OF THE PARTIES ON THE APPLICATION FOR COUNSEL FEES

PETITIONER

Petitioner anchors her argument that the Commissioner has inherent authority to award reasonable counsel fees to prevailing parties in contested cases adjudicated by him on several grounds. One, petitioner says she is the prevailing party in the matter by virtue of the Consent Order and the earlier temporary restraint against the Board granted her. Two, the Commissioner's authority to hear and determine controversies and disputes under Education Law must be broadly construed to include counsel fees to enable him to promote and advance the laws and policies of this State. In this regard, petitioner cites Bd. of Ed. of City of Newark v. Levitt, 197 N.J. Super. 239 (App. Div. 1984) which held that the Commissioner has authority to award interest on back pay improperly withheld thereby liberally construing the inherent authority of the Commissioner. Three, because the matter was presented and decided on the Law Against Discrimination, and because the Commissioner has concurrent jurisdiction with the Director of the Division on Civil Rights to adjudicate claims of sex discrimination under Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978), he has authority at N.J.S.A. 10:5-27.1 to award counsel fees in this case. Four, the Commissioner has authority to award counsel fees under 42 U.S.C.

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Sec. 1988, the federal Civil Rights Attorneys' Fees Awards Act of 1976, because the finding of unlawful discrimination on account of sex under the New Jersey statutes and New Jersey Constitution anchors the temporary restraining order which, in turn, is the basis for the Consent Order and such a finding is as equally a violation of her federal claims to equal protection and her federal statutory rights. Petitioner contends the Commissioner has authority to award counsel fees under 42 U.S.C. Sec. 1988 on the strength of Abbott v. Burke, 100 N.J. 269 (1985); Hinfey, supra; Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979); Kiss v. Dept. of Community Affairs, 171 N.J. Super. 193 (App. Div. 1979). Finally, petitioner contends that her request for counsel fees in the amount of $9,882.50, together with costs in the amount of $133.37, is, in all respects, reasonable under the circumstances.

BOARD

The Board, in opposition to petitioner's application for counsel fees, argues the Commissioner has no authority to award such fees and even if he has there is no basis in the record before him to enter such an award. The Board says that while the Levitt court found the Commissioner has inherent authority to award interest on a monetary award, a "make whole" remedy, it did not find the Commissioner authorized to grant the asserted extraordinary remedy of counsel fees. The Board explains that an award of counsel fees is an extraordinary remedy which no tribunal, not even the Superior Court, may impose " 'absent express authorization by statute, court rule or contract.[1]' " and cites State Department of Environmental Protection v. Ventron Corp., 94 N.J. 473, 504 (1983). The Board points out that the Commissioner has consistently found himself to be without authority to award counsel fees particularly where the counsel fees are to be paid by public funds.

The Board maintains that the Commissioner of Education has no authority to enforce the provisions of N.J.S.A. 10:5-1 et seq., the Law Against Discrimination and that no court in this state has ever held otherwise. In the Board's view, neither Hinfey, supra., nor City of Hackensack v. Winner, 82 N.J. 1 (1980) nor Abbott v. Burke, hold to the

[1] It is noted that under the American rule, attorney fees are not ordinarily recoverable in the absence of a statute or an enforceable contract providing therefor. Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796); Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247-62 (1975).

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contrary. Finally, the Board contends the Commissioner has no jurisdiction over federal statutes and, consequently, he cannot award counsel fees pursuant to 42 U.S.C. Sec. 1983 even if this action could be characterized as an enforcement of that federal law. Moreover, the Board says that even if the action may be characterized as an enforcement of the underlying alleged violation of 42 U.S.C. 1983, the United States Supreme Court's decision in Webb v. Bd. of Ed. of Dyer County, __ U.S. __, 105 S. Ct. 1923 (1985), prohibits the recovery of counsel fees under 42 U.S.C. 1988 for time spent before state administrative agencies.

INTERVENOR

Intervenor NJSIAA joins the Board in its argument that the Commissioner has absolutely no authority to award counsel fees in cases brought under N.J.S.A. 18A:36-20 and notes that no fee for legal services is allowed by R. 4:42-9 in the taxed costs or otherwise, except in limited circumstances, including where counsel fees are permitted by statute. Absent legislative authority, Intervenor posits that the Commissioner has no jurisdiction to award counsel fees under Education Law.

Nor, Intervenor contends, does the Commissioner have authority to award counsel fees in this case under N.J.S.A. 10:5-27.1 because such authority is granted exclusively to the Director of the Division on Civil Rights not to the Commissioner. Even if the Commissioner may grant counsel fees under this statute, Intervenor contends such an award is discretionary and then only to the prevailing party. Intervenor asserts that the record is not clear that petitioner is the prevailing party due to the Board's immediate acquiescence to the temporary restraining order. But even if petitioner is the prevailing party, N.J.S.A. 10:5-27.1 is not to be automatically invoked for the award of counsel fees and, in this case, should not be invoked. Intervenor says the Board acted in good faith in attempting to work through the NJSIAA to resolve E.B.'s initial request to play football on the boys' high school football team.

AMICUS

Amicus New Jersey School Boards Association joins the view of the Board and Intervenor that the Commissioner has no authority to award counsel fees. Amicus notes

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that the Commissioner himself has consistently refused to award attorneys fees on the basis that he is without statutory authority to do so. Amicus asserts that while the Commissioner has concurrent jurisdiction to determine issues beyond Education Law, such jurisdiction may be invoked only where the issues relate to a controversy under the school laws as in Sukin, supra, regarding an alleged violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., with respect to the termination of a school principal, or Hinfey, supra, where the Commissioner and the Director of the Division on Civil Rights were found to have concurrent jurisdiction over complaints alleging discrimination in employment by a school district. Because petitioner elected to file the instant complaint before the Commissioner, the relief available to petitioner must be limited to the relief allowable under Education Law which does not include authority to award counsel fees.

Amicus contends that even if counsel fees are appropriate in this case such fees must be reasonable and cites Singer v. State of New Jersey, 95 N.J. 487 (1984). The reasonableness of fees sought, Amicus says, is determined by whether the award would be adequate to attract competent counsel while not providing a windfall. And, Amicus points out, the Singer court held that where a civil rights litigant is unable to pay the difference between what the attorney might customarily charge and a reasonable fee awarded, counsel may absorb the difference on a pro bono basis or the client is free to seek an attorney who will charge an acceptable rate. In this case, Amicus notes, petitioner has had no out-of-pocket expense for counsel fees.

Finally, Amicus provided statistics regarding the actual annual legal costs for districts throughout the state which reveal that 173 districts expend less than $5,000 per year on legal fees, while 111 school districts expend between $5,000 to $10,000, 70 expend between $10,000 to $20,000, 112 districts expend between $20,000 to $50,000, and 11 districts in New Jersey expend over $50,000 in legal fees per year. Thus, Amicus points out, petitioner's claim of $10,000 counsel fees is a figure higher than the amount one-half of all school districts in the State expend on such fees per year.

DISCUSSION AND CONCLUSIONS ON WHETHER THE COMMISSIONER HAS AUTHORITY TO AWARD COUNSEL FEES

Petitioner's contention that the New Jersey Commissioner of Education, chief executive officer of the New Jersey Department of Education, an administrative agency

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of the Executive Branch of State government, has authority to invoke federal law to award the requested counsel fees is misplaced. The Commissioner exercises quasi-judicial authority in the adjudication of controversies and disputes which arise under school law, N.J.S.A. 18A:6-9. While in the exercise of such authority the Commissioner may grant equitable relief through the powers vested in him by the Legislature, his forum is not a "court" which would enable him to exercise full jurisdiction over federal law to grant specific relief for violation of a state law. If, as petitioner contends, the Commissioner has authority to award counsel fees in this case such authority must be found, expressed or implied, within the laws of New Jersey over which he may exercise jurisdiction. Thus, I **CONCLUDE** petitioner's argument for an award of counsel fees from the Commissioner based on federal law is without merit.

So, too, without merit is petitioner's contention that because the Commissioner has concurrent jurisdiction with the Director of the Division on Civil Rights and because this claim is assertedly grounded upon a violation of the Law Against Discrimination the Commissioner may award attorney's fees through N.J.S.A. 10:5-27.1. This case was brought under the provisions of the New Jersey Constitution and N.J.S.A. 18A:36-20 which prohibit discrimination against any pupil in a public school from obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin. In addition to the constitutional mandate and legislative expression, the State Board of Education promulgated N.J.A.C. 6:4-1.5 which prohibits discrimination on account of sex in public school intramural, extramural, and interscholastic athletic programs. While petitioner could have filed a claim either with the Division on Civil Rights or before the Commissioner of Education, she chose the latter, relying upon the cited provisions of the State Constitution Education Law and State Board regulations. True, federal law was initially pleaded as a basis for relief and, by way of amendment, the Law Against Discrimination was also invoked. It is also true that the Commissioner must ensure in controversies or disputes presented to him under Education Law that all laws of the State of New Jersey are enforced. The enforcement, however, goes to the substance of such other laws; not to the specific remedies contained therein. Remedies available to petitioner must be found within N.J.S.A. 18A:1-1, Education Law, over which the Commissioner has specific jurisdiction.

Turning then to New Jersey education law and recognizing that the Commissioner and the State Board of Education consider their rulings to have

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precedential application, a brief history of prior administrative decisions by the Commissioner and State Board of Education which address legal counsel and counsel fees generally is in order.

That boards of education have implied power at N.J.S.A. 18A:16-1 to employ counsel to advise it in legal matters is well established and recognized by the Commissioner of Education and the State Board of Education. Nicosia v. East Paterson Bd. of Ed., 1949-50 S.L.D. 49; Houston v. North Haledon Borough Bd. of Ed., 1959-60 S.L.D. 73, aff'd St. Bd. of Ed. 1960-61 S.L.D. 232. Inherent within the implied authority of a board to employ counsel is the authority to compensate counsel for services rendered.

In addition, the Commissioner has consistently enforced the provisions of N.J.S.A. 18A:12-20, N.J.S.A. 18A:16-6, and N.J.S.A. 18A:16-6.1 each of which, respectively, obligates boards of education to indemnify its members against the cost by way of counsel fees of a defense of civil and criminal action arising out of and in the course of their performance as board members, to indemnify officers and employees against civil actions by way of counsel fees for acts or omissions arising out of or in the course of the performance of their duties and, in certain criminal actions to indemnify officers and employees by way of counsel fees against whom a criminal action is instituted for an act or omission arising out and in the course of the performance of their duties and the charges are thereafter dismissed or result in a final disposition in favor of such person.

Historically, however, the Commissioner has declined to award interest, costs, or counsel fees to prevailing parties in matters contested before him absent specific authorization by statute. The first reported decision in School Law Decisions[2] wherein the Commissioner, in 1966, declined to award interest and costs in the absence of statutory authority occurred is Romanowski v. Jersey City Bd. of Ed., 1966 S.L.D. 219, which policy in regard to interest was strictly followed by the Commissioner until Levitt, supra. In Levitt, petitioners instituted proceedings with the Commissioner of Education arguing that their assignment by the Newark Board of Education as long-term substitute teachers from 1945 through 1961 improperly preventing them from acquiring tenure

[2] School Law Decisions are bound volumes of decisions rendered by the Commissioner of Education since 1912, prepared and distributed by the Department of Education. The first such volume this writer's research discovered is entitled "1938 School Law Decisions" and contains rulings from 1912 through 1938. The most recent such volume was prepared by the Department of Education for the 1980 calendar year.

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protection and also denied them proper placement on the salary guide. The Commissioner issued a decision in 1977 finding that petitioners were regular full-time teachers during the years in question and ordered the board to compensate them for the back pay and benefits due them. Although the board did not appeal the Commissioner's decision, it failed to make payment to petitioners in accordance with the Commissioner's decision. In 1979 petitioners commenced an action in the Chancery Division to compel compliance. On appeal the Appellate Division affirmed the Commissioner's order but remanded to the Commissioner to compute the sums actually due to petitioners. On remand the Commissioner calculated the amount due petitioners but declined to award post-judgment interest on the award absent a statutory basis for such awards. Thereafter the Appellate Division noted that there was no general rule or statute prohibiting post-judgment interest against public boards and that such bodies are, as a matter of customary practice, subject to post-judgment interest unless good cause is shown. The Levitt court concluded that although this power had not been expressly awarded to the Commissioner by statute, it was nevertheless an ancillary power which he must be deemed to have in order fully to execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws.[3]

The first reported decision of the Commissioner wherein an application for legal fees was made following the adjudication of a controversy or dispute arising under the school laws is David v. Cliffside Park Borough Bd. of Ed., 1967 S.L.D. 192. The Commissioner concluded that absent precedent or a specific statute he had no authority to award legal fees to the prevailing party in matters contested before him. The policy thus established of not awarding legal fees absent statutory authority to prevailing parties in contested cases before him was followed by the Commissioner, with some exceptions, to the present day. See, Bartlett v. Wall Township Bd. of Ed., 1971 S.L.D. 163; Noorigian v. Jersey City Bd. of Ed., 1972 S.L.D. 266, aff'd in part, rev'd in part, St. Bd. of Ed., 1973 S.L.D. 777; Convery v. Perth Amboy Bd. of Ed., 1974 S.L.D. 372; Butler v. Jersey City Bd. of Ed., 1974 S.L.D. 890; Smith v. Egg Harbor Township Bd. of Ed., 1974 S.L.D. 430; Winter v. No. Bergen Bd. of Ed., 1975 S.L.D. 236; No. Bergen Federation of Teachers v. No. Bergen Bd. of Ed., 1975 S.L.D. 461; Lilenfield v. Watchung Borough Bd. of Ed., 1977 S.L.D. 315; Watsula v. Plumsted Twp. Bd. of Ed., 1977 S.L.D. 692; and, Richford v.

3. The State Board of Education proposed rules, published in the New Jersey Register, February 18, 1986, for the awarding of interest by the Commissioner. 18 N.J.R. 409. However, the Commissioner is already exercising authority to award interest on back pay. See Sirianni v. Howell Twp. Bd. of Ed., 1986 S.L.D. _____ (Feb. 6, 1986).

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Elmwood Park Borough Bd. of Ed., 1978 S.L.D. 855. Even in unpublished decisions, the policy of not awarding counsel fees absent express statutory authority was and is followed by the Commissioner. See, as examples, McGuire v. Northfield Bd. of Ed., 1979 S.L.D. - (May 24, 1979); Coyle v. Maple Shade Twp. Bd. of Ed., 1979 S.L.D. - (Sept. 24, 1979); Zielinski v. Guttenberg Bd. of Ed., 1981 S.L.D. - (Jun. 18, 1981); and, Brownlee v. Newark Bd. of Ed., 1985 S.L.D. - (Sept. 27, 1985).

While the Commissioner was enforcing the policy against an award of legal fees, interest, and costs absent statutory authority to do so, the case of In the Matter of "T" v. Tenafly Bd. of Ed., 1974 S.L.D. 420 was also heard. In this case the Commissioner ruled he had no authority to award "damages" by way of tuition to the parents of a handicapped youngster who was unilaterally placed in a private school by the parents. But, in M.P. v. Delran Township Bd. of Ed., 1985 S.L.D. _____ (Dec. 30, 1985) the Commissioner did order the Delran Board to pay such "damages" by way of tuition at another public school district for M.P.'s daughter when M.P. unilaterally withdrew the child from the Delran schools because of a real fear for her physical safety created by other Delran pupils. In this case the Commissioner recognized the absence of statutory authority for such relief but relied instead upon his "broad authority pursuant to Robinson v. Cahill [62 N.J. 473, (1973)]." See, also, Harbor Hall School v. Weehawken Bd. of Ed., 1977 S.L.D. 342, J.G. v. Pompton Lakes Bd. of Ed., 1979 S.L.D. 105.

In contrast to the stated policy against an award of counsel fees absent express statutory authority, the Commissioner did award counsel fees, absent statutory authority, in the case of Ross v. Jersey City Bd. of Ed., 1981 S.L.D. - (Mar. 9, 1981), aff'd St. Bd. of Ed., 1981 S.L.D. - (Oct. 9, 1981). Ross was the superintendent who retained private counsel to challenge an action taken by the board in the appointment of two assistant superintendents of school without his prior nomination. Ross, prevailing on the merits of his claim, applied for reasonable counsel fees and costs in connection with the litigation. The Commissioner adopted the finding of the assigned administrative law judge who stated

> * * * This judge does not find it unreasonable to order the Board of Education to pay those reasonable counsel fees and costs which have been incurred in the filing of the instant Petition, which was filed by Petitioner [Ross] in order to carry out his mandatory statutory duties.

The Commissioner, in adopting the reasoning of the administrative law judge, held as follows:

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> In regard to the issue of the Board's responsibility for reasonable counsel fees incurred by petitioner in bringing this matter before the Commissioner in his capacity as chief administrative officer and member of the Board, the Commissioner concurs with the determination of [administrative law] Judge Moses herein that the board must bear the costs of these fees. The Commissioner so holds.

No statutory authority for the award of counsel fees was cited either by the administrative law judge nor by the Commissioner of Education. Nor is there reference made in the decision to an enforceable contract providing for counsel fees between Ross and the board. (See fn. 1, ante.). Consequently, the Commissioner relied upon his inherent power to hear and determine controversies and disputes which arise under school law and in his adjudication of such cases to take necessary and reasonable steps to ensure that the school laws are being faithfully and fully effectuated. The State Board of Education, it is noted, affirmed the Commissioner's decision in Ross, "* * * for the reasons expressed therein [by the Commissioner]".

Shortly thereafter, however, in the consolidated case of Hogan v. Kearny Bd. of Ed. and Kearny Bd. of Ed. v. Hogan, 1982 S.L.D. - (Apr. 12, 1982), a group of then present and former board members was denied reimbursement of legal fees for challenging in New Jersey Superior Court an action taken by a majority of the board with which they disagreed. The group was denied legal fees on the basis that N.J.S.A. 18A:12-20

> * * * was never intended to give board members a free reign to bring suits as individuals or as groups of individuals acting in accord what with they think are their duties as members, which perception is not in accord with the majority of the board.
>
> (Initial decision, at p. 21, aff'd Comm'r of Ed., April 12, 1982)

On appeal to it, the State Board of Education affirmed the denial of legal fees on the following basis:

> * * * Since the underlying action for which legal fees were incurred did not arise out of the duties or in the course of the performance of duties of members of the board pursuant to N.J.S.A. 18A:16-6, there is no authority to award reimbursement of

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> legal fees and expenses. Furthermore, to the extent that petitioners desired to have alleged statutory violations investigated and pursued, avenues other than private law suits brought by them were available such as referral of the alleged violations to the State Department of Education, the Attorney General's Office or other law enforcement agencies. (emphasis added) See for example Emmons v. Board of Education of the City of Trenton, (decided by the State Board, November 5, 1980; App. Div., aff'd, October 1, 1981, docket No. A-1491-80T4), and Ross v. Board of Education of the City of Jersey City, (State Board affirmed, October 7, 1981).

The Ross case was discussed above. In Emmons, Emmons was the superintendent of the Trenton City schools, and was granted early tenure by the board. When that action was subsequently challenged, the board chose not to defend the attack. Emmons arranged for his own counsel to protect his position and his defense was successful. Emmons then filed a petition of appeal before the Commissioner seeking reimbursement of legal fees and costs incurred in defending against the attack on the earlier board action of granting him early tenure. The State Board held that Emmons was not entitled to reimbursement of counsel fees on the following grounds:

> N.J.S.A. 18A:16-6 provides for reimbursement of legal fees and costs incurred by a board employee in any civil action brought "for any act or omission arising out of and in the course of the performance of the duties" of his employment. This controversy did not arise out of any such act or omission; rather, the petitioner was defending his right to tenure of an office under the Board. In so doing, he was acting for his own benefit rather than that of his employer * * *

In 1984, the Commissioner awarded counsel fees under N.J.S.A. 18A:12-20 to two elected members to the Newark Board of Education which board refused to swear in and seat them as Board members. The members filed a petition of appeal and, being the prevailing parties, were awarded counsel fees in the sum of $8,440.18. Brown v. Newark City Bd. of Ed., 1984 S.L.D. (Dec. 19, 1984). In 1985, the Commissioner awarded counsel fees to a former member of the Newark board who filed a petition of appeal before the Commissioner challenging the Newark board's action to terminate the employment of General Counsel and hire new General Counsel without the recommendation of the board's Executive Superintendent. Gibson v. Newark City Bd. of Ed., 1985 S.L.D. - (Jan. 22, 1985). The Commissioner supported such award, absent specific statutory authority; or an enforceable agreement in the following manner:

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> [T]he Commissioner finds and determines that petitioner [Gibson] is entitled to be awarded counsel fees inasmuch as the action which was initiated by him as a Board member before the Commissioner was taken at his own personal expense in an effort to force the Board to comply with statutory prescription with regard to the concept of unit control and organization pursuant to the enacted provisions of N.J.S.A. 18A:17A-1 et seq. [the Public School Education Act of 1975.] This determination is consistent with the reasons laid down by the Commissioner's prior ruling in Ross, supra. * * *

The Commissioner's decisions in M.P., supra., Ross, supra., and Gibson, supra., wherein the Commissioner fashioned relief for M.P. and awarded counsel fees in Ross and Gibson without express statutory authority appear more in line with the broad powers given him to hear and determine all controversies and disputes arising under the school laws than the policy of denying equitable relief and counsel fees in the absence of express statutory authority.

In regard to the broad powers of the Commissioner, it is noted that the New Jersey Constitution gives explicit authority for legislative "maintenance and support of a thorough and efficient system of free public schools." N.J. Const., (1947), Art. VIII, § IV, para. 1. As a result, the Legislature has adopted comprehensive enactments which, among other things, delegate the "general supervision and control of public education" in the State to the State Board of Education in the Department of Education. N.J.S.A. 18A:4-10. The Commissioner, as chief executive and administrative officer of the Department, is vested with broad powers including the "supervision of all schools of the state receiving support or aid from state appropriations" and the enforcement of "all rules prescribed by the state board." N.J.S.A. 18A:4-23. The Commissioner has the power to "inquire into and ascertain the thoroughness and efficiency of operation of any of the schools of the public school system of the state," N.J.S.A. 18A:4-24; is directed to instruct county superintendents and superintendents of schools as to "the performance of their duties, the conduct of the schools and the construction and furnishing of school houses." N.J.S.A. 18A:4-29; and he is, of course, empowered to hear and determine controversies and disputes arising under school laws, N.J.S.A. 18A:6-9.

The New Jersey courts have been called upon from time to time to reaffirm the breadth of the Commissioner's powers under the State Constitution and the implementing legislation. Our Supreme Court has repeatedly affirmed the breadth of the

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Commissioner of Education's powers by recognizing his "fundamental and indispensable jurisdiction over all disputes and controversies arising under school laws. N.J.S.A. 18A:6-9." Hinfey, supra. In Laba v. Newark Bd. of Ed., 23 N.J. 364 (1957), the New Jersey Supreme Court held that the Commissioner's "primary responsibility is to make certain that the terms and policies of the School Laws are being faithfully effectuated," Id. at 382, and he is empowered to remand controversies and disputes "for further inquiry" at the local board level when such course of action seems appropriate. Id. at 383.

The Supreme Court rejected a narrow interpretation by the Commissioner of his powers to review determinations by the State Board of Examiners in In re Masiello, 25 N.J. 590 (1958). The Court held that the Commissioner's responsibilities entailed independent factual findings and independent interpretations of State Board rules. Id. at 606-07.

In Bd. of Ed., E. Brunswick Tp. v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966), the voters rejected the school budget proposed by the Township Board of Education. The Township Council then proceeded to cut the budget. The Board filed a petition with the Commissioner of Education. The issue raised was whether the Commissioner had the power to decide this controversy between the Board and the Council and restore the cut in the budget. The Supreme Court found that the Commissioner did have such authority. Id. at 101. See also, Bd. of Ed. of Elizabeth v. City Council of Elizabeth, 55 N.J. 501 (1970). Referring to the constitutional mandate for the maintenance and support of a thorough and efficient school system, N.J. Const., (1947), Art. VIII, § IV, para. 1, the Court noted that the Legislature had directed local school districts to provide "suitable school facilities and accommodations," N.J.S.A. 18A:33-1, 2, and had vested the State supervisory agencies "with far reaching powers and duties designed to ensure that the facilities and accommodations are being provided and that the constitutional mandate is being discharged." E. Brunswick, supra., at 103-04. See also Robinson v. Cahill, 69 N.J. 449, 459-60 (1976).

In Jenkins v. Morris Tp. School Dist. and Bd. of Ed., 58 N.J. 483 (1971), the Supreme Court held that the Commissioner of Education, under the State Constitution and implementing legislation, had the authority to take suitable steps toward preventing Morris Township from withdrawing its students from Morristown High School and toward effectuating a merger of the Morristown and Morris Township school systems. The Commissioner had mistakenly determined that he lacked the power to direct such a

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merger to resolve the dispute involved. The Commissioner's jurisdiction over school litigation which encompasses questions regarding tenure rights, N.J.S.A. 18A:28-5, has also been held to allow him to fix dollar amounts due for retroactive benefits when a question of the accrual of tenure rights is resolved in a teacher's favor. See, Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 84 (1982).

In Levitt supra, the Appellate Division viewed interest on a money award the Commissioner is authorized to grant as an "essential and integral part of the award itself since the purpose of the fixed-sum award is to make petitioner whole." at 246. The court also saw an award of interest as "more appropriately made by the Commissioner as part of his determination of the cause than by a court which could do so only by undertaking a complete review of the entire record of the case. Levitt, at 237. The court felt that to hold otherwise would encourage piecemeal litigation, result in a waste of resources of both the litigants and the courts, and that "[i]t is clearly more sensible and economical for the Commissioner to make the determination in the first instance." Levitt, at 247. A logical corollary to the holding in the Levitt case is that the Commissioner is able to award counsel fees. A similar application to a judicial branch court for an award of attorney's fees would have to be made if the Commissioner does not award the fees. This too would be a waste of the court's resources.

This conclusion is not inconsistent with the holding of the Supreme Court in In re Jamesburg High School Closing, 83 N.J. 540 (1980). In that case the court found that it was not at liberty to presume the Legislature intended something other than what it expressed by its plain language. The Court reaffirmed that "an administrative officer is a creature of legislation who must act only within the bounds of the authority delegated to him," In re Jamesburg, at 549, quoting from Elizabeth Fed. Sav. & Loan Ass'n v. Howell, 24 N.J. 488, 499 (1957), and held that where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied. In re Jamesburg, at 549. The above conclusion is not inconsistent with this case because one, the Constitution and legislation are not plain in enumerating all the specific powers of the Commissioner of Education, and, two, there is no doubt that the Commissioner may award compensatory damages. Since the Levitt court ruled affirmatively on the Commissioner's power to award interest, the Commissioner should be able to award counsel fees.

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Based on the foregoing historical review of the Commissioner's policy denying counsel fees in the absence of express statutory authority, while carving out exceptions to that rule by granting counsel fees and other relief not specifically authorized by statute, and in light of the Commissioner's primary responsibility 'to make certain that the terms and policies of the School Laws are being faithfully effectuated', I **CONCLUDE** that the New Jersey Commissioner of Education has ancillary authority to award counsel fees to prevailing parties in contested cases adjudicated by him. This conclusion is buttressed by the realization that the interest of the judicial and administrative process, as well as the interest of the litigants, would be advanced by his exercise of such authority rather than deferring the question to a court for separate adjudication.

ARE COUNSEL FEES APPROPRIATE IN THIS CASE AND IF SO IN WHAT AMOUNT

The short answer is that counsel fees are appropriate in this case. Clearly, E.B. prevailed on her claim of unlawful discrimination through the issuance of the temporary restraining order otherwise made permanent by the Consent Order attached. E.B. as a result thereof was not prohibited from trying out for football. Without the order, she was denied that opportunity. E.B. prevailed and she is the prevailing party.

The record suggests that E.B. did not rush to secure counsel to institute this proceeding to vindicate her state constitutional and statutory rights not to be discriminated against on account of sex. The record suggests that E.B. made several good faith attempts to persuade school officials to allow her the opportunity, at the very least, to try out for the high school football team for reasons similar to why anyone tries out for football - to test themselves in a highly competitive and physical sport. At each step along the way E.B. was not only unsuccessful in her attempts to try out for the team, she was given no answer why she was prohibited from trying out for football. The Board itself, the record suggests, listened to E.B.'s plea to try out for the team but rebuffed her in the same manner as its athletic director and football coach - without explanation. E.B.'s efforts certainly could have been successfully thwarted at this stage but for ACLU-NJ taking on her case.

It is true that S.B., the mother, could have filed a Petition of Appeal pro se on behalf of E.B. before the Commissioner of Education. Had that occurred, there is no guarantee that the result would have been the same because of the presumed lack of skill

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and experience of S.B. in arguing a cause of action as compared with the recognized skill, experience and competency of Board counsel. Consequently, without the efforts of ACLU-NJ, E.B. more likely than not would have continued to suffer discriminatory treatment regarding her attempts to try out for the football team.

Moreover, the courage of E.B. to bring this action with certain knowledge she would be subjected to criticism for being a "female" invading the sanctuary of a sport historically reserved for males has more likely than not heightened the awareness in this state of our strong constitutional and statutory proscription against discrimination on account of sex.

Intervenor's position that counsel fees should not be awarded because of the unique circumstances of this case wherein the Board, in good faith, was attempting to work with NJSIAA through the Department of Education to get clarification of NJSIAA rules is not persuasive. Looking beyond the then proposed rules of NJSIAA, our state constitution prohibits discrimination on account of sex, as does our Education Law, as well as the State Board rules and regulations. Surely, the North Hunterdon Regional Board of Education, its agents, officers and employees were aware of the strong public policy against discrimination without the need for assistance from NJSIAA. Had E.B. been allowed to try out for football and failed a preliminary physical, or skills test, or strength test which would have been administered to all try-outs, this case more likely than not would not have arisen. Rather, the sole reason she was denied the opportunity to try out for the football team was on account of her sex which forms the underlying basis for this action.

An award of attorney fees is not precluded by reason of the fact petitioner was represented not by a private attorney paid by her but rather by an attorney provided by the American Civil Liberties Union. Carmel v. Hillside, 178 N.J. Super. 185, 189 (App. Div. 1981). In this case which decided the issue of attorney fees under 42 U.S.C. § 1988, the court held

> We are satisfied that there is no rational functional distinction in this context between a publicly-funded legal services entity and a privately funded entity whose purpose is to provide legal representation to litigants who might not otherwise pursue the vindication of their civil rights. Id. at 189-190.

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The same policy considerations apply in this case. Without ACLU-NJ. E.B. may not have had her rights vindicated.

For all the foregoing reasons, I **CONCLUDE** that counsel fees are appropriate.

There is no precise rule or formula in setting attorney fees. The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate. Singer v. State, 95 N.J. 487, 499 (1984), citing Hensley v. Eckerhart, 461 U.S. 424, 433, 103 S. Ct. 1933, 1935, 76 L. Ed. 2d 40, 50 (1983). This arithmetic result or "lodestar" may then be adjusted upward or downward.

The request for $9,882.50 in attorney fees here is arrived at in the following manner based upon the affidavits filed by Anne McHugh, P. Kay McGahen, and Deborah Karpatkin. McHugh attests that she spent 42.75 hours on the matter, which I find reasonable, and she seeks $125 per hour, which I also find reasonable in light of her training, skill and experience. McHugh claims 20.25 hours at $85 per hour for work performed on the case by E. Elizabeth Sweetzer, an associate in her law firm. McHugh claims 5.50 hours spent on the case, at $25 per hour, for Jeffrey Siegel, a paralegal with her firm who is a third year law student at New England College of Law. P. Kay McGahen claims 12.8 hours of work at the rate of $100 per hour, while Deborah H. Karpatkin claims 14 hours of work at the rate of $100 per hour. In addition, Karpatkin claims $19.37 in telephone costs.

While the issue presented by E.B. is an important issue on a state-wide basis, there was no necessity for any more than one attorney assigned to this case in order to secure the result achieved. While it is true that a motion to amend the initial pleading was made, supported by letter memoranda by and between the parties, initial briefs and reply letter memoranda to those briefs were filed in support of counsel fees were also filed, and in short, an exchange of written communication was had on different occasions, the simple fact remains that E.B. secured the relief sought on August 22, 1985 when the Commissioner of Education affirmed the initial decision by which the Board was prohibited from denying E.B. the opportunity to try out for the football team. Thereafter, a flurry of activity occurred not so much with the case presented by E.B. but on the issue of attorney fees. While hours spent in preparing briefs in support of an application for attorney fees may be included in an award of counsel fees, in my view such an award for

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those kinds of hours spent here would be improper. Furthermore, I am not persuaded that costs in the amount of $133.37 should be awarded.

In consideration of the foregoing, I **FIND** that counsel fees in the amount of $5,343.75, reflecting 42.75 hours expended on the case by Anne P. McHugh at the rate of $125 per hour is reasonable and appropriate given the circumstances of this case.

Accordingly, the North Hunterdon Regional District Board of Education is **ORDERED** to tender to Anne P. McHugh, on behalf of the American Civil Liberties Union, the amount of $5,343.75.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 14, 1986
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed ~~To Parties~~:

MAR 19 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ml

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E.B., an infant by her parent and guardian ad litem, S.B.,

PETITIONERS,

V.

BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL SCHOOL DISTRICT, AND ROBERT HOPEK, HUNTERDON COUNTY,

RESPONDENTS.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by all three parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c. Exceptions received from amicus, New Jersey School Boards Association, were not considered by the Commissioner as there is no provision in law or OAL rules for consideration of exceptions by other than parties to the matter. Further, an addendum to the exceptions filed by the Board was not considered by the Commissioner as there is no provision in law or OAL rules to permit such untimely submissions.

The Board's exceptions to the initial decision were five:

1. JUDGE MC KEOWN WRONGLY ABANDONED THE CLEAR, CONSISTENT LINE OF COURT AND COMMISSIONER DECISIONS HOLDING THE COMMISSIONER TO BE WITHOUT AUTHORITY TO AWARD COUNSEL FEES TO CLAIMANTS ACTING TO VINDICATE PERSONAL RIGHTS.

Respondents cite a panoply of cases, the most recent of them Brownlee v. Newark Board of Education, decided by the Commissioner September 27, 1985, for the proposition that the Commissioner has consistently found himself to be without authority to award counsel fees to individual claimants who act to vindicate personal rights. Respondents claim, inter alia, that in not a single instance has a litigant seeking to vindicate a personal claim of right before the Commissioner of Education been awarded counsel fees. Respondents stress that the Commissioner has even refused to approve voluntary settlement agreements calling for payment of counsel fees to a prevailing party, citing Vicari v. Hudson County Area Vocational-Technical Schools Board of Education, decided by the Commissioner February 24, 1983. Respondents urge that the ALJ clearly erred in abandoning this well-established education law principle. Further, respondents contend that the ALJ's reliance on three Commissioner decisions awarding counsel fees to board members who undertook, at personal expense, to compel their boards "to

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comply with the statutory prescription (Gibson v. Newark City Board of Education, decided by the Commissioner January 22, 1985; Brown v. Newark City Board of Education, decided by the Commissioner December 19, 1984) or "who resorted to legal action in order to carry out [their] statutory duties" (Ross v. Jersey City Board of Education, 1981 S.L.D. 307) is misplaced. Respondents aver that these cases are not applicable because their claims were not brought as claimants vindicating personal rights, but rather as public officers acting in the course of their regular duties and responsibilities. Instead, respondents rely on Hogan v. Kearny Board of Education, 1982 S.L.D. 329 for the proposition that even when board members seek to vindicate wholly personal claims, they must bear their own costs of counsel.

2. NO STATUTE OR COURT RULE PERMITS THE COMMISSIONER TO AWARD COUNSEL FEES TO PETITIONER IN THIS MATTER. UNLIKE COMPENSATORY DAMAGES OR POST-JUDGMENT INTEREST, COUNSEL FEES ARE AN EXTRAORDINARY REMEDY WHICH CANNOT BE AWARDED ABSENT EXPRESS STATUTORY OR COURT RULE AUTHORIZATION.

Respondents repeat the argument raised at the hearing that the State of New Jersey adheres to the "American Rule" which bars a prevailing litigant from recouping counsel fees from the losing party, citing Van Horn v. City of Trenton, 80 N.J. 528, 538 (1979). Respondents reiterate that specific exceptions to the "American Rule" are instances in which either the Legislature, by statute, or the Supreme Court, by court rule, has expressly authorized the awarding of fees. See State Department of Environmental Protection, 94 N.J. at 504; Gerhardt v. Continental Insurance Cos., 48 N.J. 291, 301 (1966). Respondents urge that absent such express authority, the awarding of counsel fees is beyond the authority of any tribunal in this state. See, e.g., Right to Choose v. Byrne, 91 N.J. 287, 316 (1982). Respondents aver that the ALJ's citing Board of Education of the City of Newark v. Levitt, 197 N.J. Super. 239 (App. Div. 1984) is erroneous. Respondents contend Levitt stands for the proposition that the Commissioner possesses full authority to award pre- and post-judgment interest on fixed-sum awards "since the purpose of the fixed-sum award is to make petitioner whole." (at 246) The award of such interest is, by "long-established practice, routinely allowed" by the courts as a make-whole remedy. (at 244-5) By contrast, respondents argue, counsel fees are not "routinely allowed." The State's Supreme Court makes clear that counsel fees are extraordinary remedies which cannot be awarded absent express authorization which simply does not exist in Commissioner actions, contend respondents. Further, respondents urge that Judge McKeown correctly found no statute or rule permitting him to award petitioners counsel fees. His analysis, in respondents' opinion, should have ended at that point.

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3. JUDGE MC KEOWN HAS IMPOSED COUNSEL FEE LIABILITY UPON RESPONDENTS AS A FORM OF "PUNISHMENT", THUS EXPLAINING HIS RELIANCE ON A DECISION AWARDING DAMAGES. THE COMMISSIONER CLEARLY LACKS AUTHORITY TO AWARD PUNITIVE DAMAGES.

Respondents aver that despite the fact that petitioners received complete substantive redress without having to pay one cent in legal fees, the ALJ felt compelled to also impose some amount of "damages" against respondents in the form of legal fees. Respondents contend that the Commissioner has no authority to punish any party, either expressly or in the distinguished form of an award of counsel fees.

4. JUDGE MC KEOWN ERRED IN AWARDING COUNSEL FEES IN A CASE OF FIRST IMPRESSION, IN WHICH THE RESPONDENTS RELIED, IN OBJECTIVE GOOD FAITH, ON THE STATE OF THE LAW AS IT EXISTED PRIOR TO THE INSTITUTION OF THIS MATTER, AND IN WHICH THE RESPONDENTS ACTED WITH EXTREME EXPEDIENCE TO REMEDY THEIR VIOLATION OF PETITIONER'S RIGHTS.

Respondents claim that not until the entry of Judge McKeown's interim relief order in this matter was there any indication that the law of this state would go beyond that required under federal law and deny local boards the discretion to exclude females even from "males only" contact sports teams. Respondents argue that the extraordinary award of counsel fees is wholly improper. It amounts to nothing more than a penalty imposed upon respondents for daring to rely on what they understood in good faith to be their legal rights. Additionally, respondents aver that the extraordinary award of fees in this matter will discourage the settlement of future disputes because boards "will fight to the bitter end" in an effort to avoid the imposition of counsel fees rather than settle.

5. JUDGE MC KEOWN ACTED CONTRARY TO THE PUBLIC POLICY OF THIS STATE IN IMPOSING AN EXTRAORDINARY MONETARY REMEDY UPON A PUBLIC BODY WHICH ACTED IN GOOD FAITH.

Respondents reiterate the argument they raised at the hearing that they relied in good faith upon 34 C.F.R. sec.106.41 in denying E.B. permission to join a "males only" high school football team. Citing Levitt, supra, at 248, n. 3, for the proposition that when public funds are involved, the courts of this state have consistently exercised moderation, respondents aver that it is clear that extraordinary monetary remedies are to be imposed against public bodies with restraint, and only when exacerbating factors such as bad faith are present. Respondents contend that the ALJ acted contrary to public policy by imposing the extraordinary remedy of counsel fees upon a public body which acted in good faith

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regarding a then-unsettled question of law. For the above reasons, respondents submit that the Commissioner must reject the ALJ's initial decision awarding petitioners counsel fees.

Petitioners' reply exceptions aver that contrary to respondents' Exception I, the ALJ correctly found that the Commissioner has the authority to award counsel fees. Petitioners cite Ross, supra, and Gibson, supra, as apposite and suggest that petitioners herein sued in furtherance of the statutory mandates of N.J.S.A. 18A:36-20 and the state and federal civil rights laws as did the petitioners in Ross and Gibson. Petitioners contend Hogan, supra, is inapplicable because petitioners here were not seeking vindication of a wholly personal claim. Rather, they sought, successfully, to compel respondents to comply with their legal obligations and to vindicate the rights of all female students as guaranteed by state and federal law, citing the initial decision, ante, for support of this contention.

Petitioners counter respondents' Exception II by reiterating their argument made at the hearing that there is substantial statutory and decisional authority for the award of fees herein. Further, petitioners urge the Commissioner to consider N.J.S.A. 10:5-27.1 as an appropriate basis for an award of fees. Petitioners aver that contrary to the finding of the ALJ, Hinfey v. Matawan Regional Bd. of Ed., 77 N.J. 514 (1978) makes clear that petitioners had no choice but to submit a discrimination claim to the Commissioner of Education to enforce the substance of the civil rights laws. Thus, claim petitioners, it is right and appropriate for the Commissioner to enforce their remedies.

Petitioners respond to respondents' Exception III suggesting that while respondents may perceive the award of counsel fees herein as "punishment", the initial decision does not support their perception. Petitioners reiterate the argument made in their post-hearing brief that the provision of counsel fees in civil rights cases is an enforcement mechanism to empower those discriminated against to sue and enforce their rights.

In reply to respondents' Exception IV, petitioners aver that the facts in this matter effectively refute this exception. To characterize respondents' actions as taken in good faith strains credulity. Petitioners cite the initial decision, ante, suggesting that the discrimination engaged in by respondents was clearly prohibited by the state constitution, education law, and State Board rules and regulations.

In rebuttal to respondents' Exception V, petitioners contend that the remedy of attorney's fees where, as here, a public entity has engaged in blatant discrimination, is hardly contrary to public policy. The state and federal civil rights laws, petitioners argue, are explicit in their expressed intention that local governmental bodies are to pay attorney's fees to prevailing parties. Moreover, petitioners argue, the ALJ's award was extremely moderate, cutting petitioners request for fees almost by half.

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Intervenor NJSIAA initially advances in its exceptions that it agrees with the ALJ's determination that petitioners are not entitled to attorney's fees under either federal law or the New Jersey Law Against Discrimination, citing Ayers et al. v. Jackson Tp., 202 N.J. Super. 106, 128-129 (App. Div. 1985), which rejected the claim that counsel fees can be awarded under 42 U.S.C. sec. 1998 when a state remedy is sufficient. Yet, avers intervenor, the reasoning underlying the ALJ's decision to award counsel fees is flawed in that he relied heavily on Newark Board of Education v. Levitt, supra. Intervenor argues that the Commissioner's authority to award post-judgment interest as established in Levitt clearly cannot serve as the basis upon which he might be granted unbridled authority to award counsel fees, absent statutory authority. An award of counsel fees is clearly not a logical corollary to Levitt, argues intervenor. Since the Legislature has provided the Commissioner with very limited authority to award counsel fees, that is, only when indemnifying board members, officers and employees under N.J.S.A. 18A:12-20, 16-6, and 16-6.1, it is not our province, suggests intervenor, to question the legislative wisdom of failing to include an attorney's fee provision in the education statutes relating to cases in which private litigants seek personal relief. See Klink v. Monroe Tp. Council, 181 N.J. Super. 25, 30 (App. Div. 1981)

Further, intervenor argues that the Commissioner should not countenance the counsel fee award as it clearly represents a punitive measure. This is particularly evident, it avows, as petitioners sought only injunctive relief, not money damages. The Board's good faith actions clearly do not warrant imposition of this punitive award.

Finally, intervenors contend that NJSIAA guidelines mentioned herein, which were promulgated with the review by the Office of Equal Educational Opportunity, were not made available to respondents. This was due to the fact that a formal response from the Department of Education, which NJSIAA deemed requisite for its final adoption of said guidelines regarding female athletes' involvement in interscholastic sports, was not forthcoming until after institution of the instant Petition of Appeal. Intervenor suggests that absent specific direction from the Commissioner on this very unique problem of female participation on all-male interscholastic teams, respondents were placed in a precarious position. Intervenor relied on federal regulations in promulgating its guidelines prohibiting girls from trying out for boys' contact teams. Had Respondent Board ignored the NJSIAA guidelines, it could well have not been sanctioned by the state association, avows intervenor. Respondents should not now be punished for relying in good faith upon intervenor's guidelines. For the foregoing reasons, intervenor respectfully urges the Commissioner to reject the determination in the initial decision that counsel fees be awarded to petitioners.

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Having reviewed the extensive exceptions, as well as the record in this matter, the Commissioner reverses the determination of the ALJ that he may grant petitioners' request for attorney's fees for the following reasons.

The basis for the ALJ's granting counsel fees in the instant Petition of Appeal was predicated on the concept that the Commissioner's authority to hear and determine controversies and disputes under Education Law must be broadly construed to include counsel fees to enable him to promote and advance the laws and policies of this state. The ALJ relied heavily on Levitt, supra, wherein the Court stated:

> The question then is whether in awarding money damages to a petitioner, the Commissioner has the same power with respect to both pre-judgment interest and post-judgment interest as the court has in entering a money judgment. We conclude that although this power has not been expressly accorded to the Commissioner by statute, it is nevertheless an ancillary power which he must be deemed to have in order fully to execute his statutory responsibility to hear and determine all controversies and disputes arising out of the school laws. See N.J.S.A. 18A:6-9.
> (197 N.J. Super. at 245)

Analogizing to the inherent power granted by the Court to the Commissioner to award pre- and post-judgment interest, the ALJ concluded that the Commissioner of Education has ancillary authority to award counsel fees to prevailing parties in contested cases adjudicated by him. The ALJ's conclusion was "buttressed by the realization that the interest of the judicial and administrative process, as well as the interest of the litigants, would be advanced by his exercise of such authority rather than deferring the question to a court for separate adjudication." (Initial Decision, ante)

Having recited a litany of cases that stand for the proposition that absent precedent or a specific statute, the Commissioner has no authority to award legal fees to the prevailing party in matters contested before him, the ALJ cited Ross, supra, as an example of a case wherein the Commissioner did award counsel fees, absent statutory authority. The Commissioner therein held:

> In regard to the issue of the Board's responsibility for reasonable counsel fees incurred by petitioner in bringing this matter before the Commissioner in his capacity as chief administrative officer and member of the Board, the Commissioner concurs with the determination of [Administrative Law] Judge Moses herein that the Board must bear the costs of these fees. The Commissioner so holds. (1981 S.L.D. 307, 319)

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It should be noted that Ross stands as an exception to the consistent practice of the Commissioner to deny attorney's fees to successful litigants in education cases. See, e.g., Fallon v. Scotch Plains-Fanwood Board of Education, 185 N.J. Super. 142, 147 (Law Div. 1982). Ross also represents a deviation from the general policy that litigants bear their own counsel fees, embodied in both case law, Gerhardt, supra at 302, and in the rules governing allowance of attorney's fees in court cases. R. 4:42-9 limits such awards to certain specific circumstances, none of which apply here.

In Hogan, supra at 356, decided by the State Board, August 4, 1982, the State Board found that, except for indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A:16-6, there is no statutory authority for the award of counsel fees for cases arising under the school laws. The State Board added:

> We wish to add that, since the underlying action for which legal fees were incurred did not arise out of the duties or in the course of the performance of duties of members of the Board pursuant to N.J.S.A. 18A:16-6, there is no authority to award reimbursement of legal fees and expenses.*** (at 356)

Thus, while the "***Supreme Court has repeatedly 'reaffirmed the great breadth of the Commissioner's powers,' recognizing that he has 'fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws, N.J.S.A. 18A:6-9,'" (Levitt, supra at 246, quoting Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 525 (1978)), until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, the Commissioner declines to grant counsel fees.

The recommended decision of the Office of Administrative Law is rejected. The Petition of Appeal is dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 1, 1986

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E.B., an infant by her parent and guardian ad litem, S.B.,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE NORTH HUNTERDON REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION AND ROBERT HOPEK,

RESPONDENTS-RESPONDENTS.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, August 22, 1985

Decided by the Commissioner of Education, May 1, 1986

For the Petitioner-Appellant, Anne P. McHugh, Esq., and Deborah Karpatkin, Esq. (American Civil Liberties Union of New Jersey)

For the Respondents-Respondents, Murray and Granello (James P. Granello, Esq., of Counsel)

For the Intervenor-Respondent, Sterns, Herbert and Weinroth (Michael J. Herbert, Esq., of Counsel)

For the Amicus Curiae New Jersey School Boards Association, Cynthia J. Jahn, Esq. (Associate Counsel)

The State Board of Education denies the motion made by the New Jersey State Interscholastic Athletic Association to dismiss this case, and, for the reasons expressed in his decision, we affirm the decision of the Commissioner of Education in the matter.

S. David Brandt opposed.
Maud Dahme abstained.
September 3, 1986

Pending N.J.Superior Court

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY JUDGEMENT
OAL DKT. NO. EDU 5701-85
AGENCY DKT. NO. 295-8/85

MICHAEL PUNKO,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF RAHWAY, UNION COUNTY,
Respondent.

Paul L. Kleinbaum, Esq., for petitioner (Zazzali, Zazzali & Kroll, attorneys)

Leo Kahn, Esq., for respondent (Magner, Orlando, Kahn, Schnirman, Hamilton, Kress & Charney, attorneys)

Record Closed: February 13, 1986 Decided: March 14, 1986

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

On July 15, 1985 the Board of Education of Rahway (Board) reaffirmed a resolution requiring Michael Punko to submit to a psychological examination pursuant to N.J.S.A. 18A:16-2. On August 22, 1985, Punko filed this petition disputing the Board's right to do so. The matter was transmitted to the Office of Administrative Law on September 10, 1985 for determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

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A prehearing was held on November 21, 1985. In the prehearing order, petitioner was granted the right to file a summary judgment motion by January 10 and respondent was to answer by January 30, 1986. The motion and answers were filed. By a conference call on February 13, 1986, I gave notice to counsel that an opinion would issue on the motion and that the hearings on March 3 and 4, 1986 were adjourned. I closed the record on February 13, 1986 with notice of decision on the motion.

Statement of Issues

The reasons why the Board considered requiring petitioner to submit to a psychiatric examination were stated in its initial notice of April 4, 1985 as:

(1) Your attendance record
(2) Your incidents of insubordination
(3) Your going into student files without permission.
etc.

For the purposes of this motion, petitioner admits to each of the three reasons stated by the Board but objects to consideration of those which the Board alludes to under "etc." Petitioner disputes the legal propriety of the Board to consider any reasons under et cetera absent their inclusion in a written statement after passage of the resolution. It may not be necessary to reach a determination on this procedural question, however, if the answer to the following question with respect to all the alleged conduct is negative:

> Does the conduct of petitioner alluded to in the Board's reasons demonstrate harmful significant deviation from normal mental health within the meaning of N.J.S.A. 18A:16-2?

The question is whether or not the statutory precondition to the Board's authority to require an examination has been met. If not, the Board may not require a psychiatric examination. The petition couches the issue in abuse of discretion terms. The issue is not arbitrariness, however, but whether or not the facts support a conclusion that the statutory standards have been met. The relief is an order enjoining the Board from requiring petitioner to submit to the examination.

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In responding to petitioner's motion for summary judgment, the Board does not claim that genuine issues as to material facts exist which can only be determined at a plenary hearing. Rather, respondent adds some additional evidentiary documentation and affidavits of the superintendent and a Board member stating their opinions concerning petitioner's conduct and attesting to their good faith in requesting examination. The Board also included a transcript of the proceedings before the Board which resulted in its determination to require a psychiatric examination. Petitioner did not lodge an objection to the documentation. Thus neither side objected to the documentary evidence and the facts of petitioner's conduct as taken from the documentation offered by both parties can be considered undisputed for the purposes of this motion.

Findings of Fact

1. Michael Punko has been employed with the Board since September 1971 as a full-time physical education and health teacher; he served in a junior high school until 1978, when he was assigned to the high school.

2. Punko was head varsity football coach from 1978-79 until 1983-84, when he acted contrary to school policies and to directives of his superiors by excluding certain students from the team, was reprimanded, and had his increment for 1984-85 denied on grounds of insubordination and failure to follow Board policy. An ALJ found that the Board had a reasonable basis for its action and the Commissioner affirmed. OAL DKT. EDU 2995-84 (Nov. 9, 1984) aff'd Comm. (Dec. 21, 1984).

3. From September 1984 through April 1, 1985, Punko was assigned two periods of instruction and five periods of security/hall duty, which involved monitoring the halls to make sure students were not cutting classes or smoking in the lavatories, taking care of problems such as fighting in the halls, keeping out intruders and maintaining security around the perimeter of the building.

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4. Punko was reassigned to full-time teaching duties April 1, 1985 after an incident in which he reviewed a student's file.

5. During his 14 years of teaching, Punko could have accumulated 146 days of sick leave; he used 141 sick days, or an average of 10.07 per year.

6. Punko's absences were scattered, and substantially coincided with the absences of a female teaching staff member. The common absences included:

1980-81	10 days
1981-82	8 days
1982-83	6 days
1983-84	10 days

7. On October 9, 1984, the superintendent required Punko to attend a meeting to discuss his attendance record, and after the meeting on October 24, 1984, memorialized it with a memo which noted the common absence pattern between Punko and the female teaching staff member and noted that the pattern was one of Monday/Friday absences. The superintendent concluded: "If such absence patterns do not cease immediately, I will have no alternative than to recommend to the Board of Education to proceed with a tenure hearing and/or a withholding of an increment for the next school year."

8. Punko was absent seven days during the 1984-85 school year, five of them prior to the Board's notice of intent to require a psychiatric examination.

9. The incident of insubordination which constitutes one of the reasons why the Board seeks a psychiatric examination is the same incident involved in the 1984-85 increment denial which was appealed to the Commissioner.

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10. As found in Docket EDU 2995-84, on November 9, 1983, Punko refused to reinstate to the football squad three students who had been assigned to an alternative education class in lieu of suspension by the high school principal, although school policy and his superiors required him to do so.

11. Punko took this position because he felt it essential that team members adhere to high standards of conduct, that playing ball for the school was a privilege and an honor and that students under disciplinary suspension should not be permitted to play.

12. On March 14, 1985, Punko entered the office of vice principal Manfredi and looked into the file of a student to check the reason for his absence on a certain date.

13. The files in Manfredi's office were confidential and contained student attendance records, medical note and other confidential materials of Class A and Class B data, and Punko had no permission to review them.

14. Teachers are not permitted to look in any student's file without permission from the executive in charge of that file, in this case, the vice principal; the student record policy is set forth in Administrative Rule No. 1, and section J of the manual.

15. Manfredi keeps his office locked when he is not there. His secretary has a key. She found Punko looking at the records and asked him to leave, but he would not, stating that the vice-principal would have to tell him that personally.

16. Punko looked into the file because he was attempting to find out whether the student was in school legally that day, since he was seen upstairs in AEC without having reported to attendance and played on the basketball team that night, whereas there was a rule that if a student is not legally in school on that day, he may not play.

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17. In the course of Punko's hall duty, he saw the student, who was listed absent, and questioned why he had not been to the attendance office and where he had been. The student claimed he had been to a dentist but could not tell Punko who the dentist was.

18. Punko discussed the student with vice principal Manfredi, brought the student to him and the student repeated that he saw a dentist but didn't know his name.

19. About four days later, Punko looked into the student's file and found a note saying that he had seen a lawyer, not a dentist. Punko waited four days to give Manfredi time to make an explanation to him about the incident, but he never did.

20. Punko claimed that he did not know he was not permitted to go into Manfredi's office or look at the student's records without his permission.

21. Although not stated in the Board's notice to Punko, he was asked about several other kinds of conduct. These were: making a hole in a door with his foot or fist ("a long time ago"); sitting through his grievance proceeding with a hat on smoking a cigar; wearing shorts in bitter cold weather when he was a football coach (prior to 1984); spitting in a wastebasket (1981); wearing a hat in the high school building contrary to the dress code (1985); telling his supervisor he could not use the phone in the field house because the director wanted to make the call to postpone a game (1980) and other 1980-81 period incidents such as failing to turn in lesson plans for which, at that time, he had an increment denied.

22. Punko considers himself a thorn in the side of the administration because he is a nonconformist.

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23. The superintendent, noting that educators serve as models, expressed the opinion that Punko's wearing a hat in the school building and before the Board is bizarre behavior since it "is an accepted practice as gentlemen we remove our hats when we enter a building."

24. The superintendent was also of the opinion that smoking a cigar on school property, whether or not it was lit, indicated a deviation from normal mental health affecting the teacher's ability to teach discipline or associate with high school students.

25. The high school principal was of the opinion that it was abnormal behavior for Punko to take memos given to him, fold them up and throw them into a basket, which he did several years previously. He was also of the opinion that it was abnormal behavior on the part of a professional teacher to chew tobacco in class and spit it in wastepaper baskets. He admitted Punko had stopped doing this "a year ago" (prior to the 1984-85 school year).

26. Principal Valentine defined abnormal action as "any behavior of any individual employee that it does not represent himself in the best light and interest as far as the profession that he represents." [Sic].

27. The president of the Board stated that, in addition to the specific conduct, the Board considered Punko's appearance, demeanor, and expressions at the hearing before the Board in this matter and at a prior grievance proceeding which led them to conclude that a psychiatric examination, rather than another disciplinary action, was needed to see if there was a problem that could be corrected.

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Discussion and Conclusion

The Board presented no psychiatric opinion addressed to the conduct of petitioner. It should not need to since "the grant of power to a board of education . . . is viewed merely as an extension of the board's authority to require a teacher to answer questions at a hearing on general unfitness." Kochman v. Keansburg Bd. of Ed., 124 N.J. Super. 203, 212 (App. Div. 1973). The court construed the statutory standard in N.J.S.A. 18A:16-2 to mean that the teacher must show evidence of harmful, significant deviation from normal mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to that teacher's control. In Gish v. Bd. of Ed. of Paramus, 145 N.J. Super. 96 (App. Div. 1976), cert. den. 98 S. Ct. 233, 434 U.S. 879 (1977), two psychiatrists advised a Board that a teacher's actions in support of "gay" rights displayed evidence of deviation from normal mental health. Nothing in the statute or case law suggests that a Board is required to obtain a psychiatrist's opinion based on a hypothetical question before it can require a psychiatric examination, however. The Board choose to do so in the Gish case; perhaps this was because of the constitutional (free speech) dimension of the teacher's gay rights activity or controversy in earlier years concerning whether or not homosexuality evidences mental abnormality.

In two recent decisions of the Commissioner, Boards had sufficient justification to seek an examination based on the opinions of medical doctors: Mahan v. Haddon Heights Bd. of Ed., OAL DKT. NO. EDU 5222-83 (March 19, 1984) aff'd by Comm. (May 2, 1984), where the school physician saw possible organic depression and Johnson v. Piscataway Twp. Bd. of Ed., 1983 S.L.D. ____ aff'd State Bd. (June 6, 1984) wherein two doctors expressed the opinion that the subject had some permanent psychiatric disability. In O'Halloran v. Independence Twp. Bd. of Ed., OAL DKT. NO. EDU 8063-83 (Nov. 13, 1984) aff'd by Comm. (December 31, 1984), the Commissioner supported a Board's requirement on the basis of the conduct of the teacher, which was described as "irrational, bizarre, self-destructive, unhealthy," and her admission she was under psychiatric care. The conduct described in that case is indeed so bizarre as to be recognized as such by reasonable and fair-minded men.

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In Gish, the Appellate Division found the board's determination to be a fair and reasonable one and cited, with approval, the Commissioner's statement of a standard to be applied in such a determination: "one which could logically be made by reasonable and fair-minded men who have evaluated petitioner's behavior and who are concerned with petitioner's fitness to be a teacher in intimate contact with numbers of impressionable, adolescent pupils." Gish, at 105. In Gish, none of the teacher's conduct cited occurred in the classroom. A teacher's fitness may not be measured "solely by his or her ability to perform the teaching function and to ignore the fact that the teacher's presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency." In re Tenure Hearing of Grossman, 127 N.J. Super. 13, 32 (App. Div. 1974), certif. den. 65 N.J. 292 (1974).

Punko's conduct in no way rises to the level of that described in O'Halloran, about which reasonable men could not differ: she clearly exhibited significant deviation from normal mental health. In O'Halloran, the harmfulness of the conduct in a school setting was also clear: the CST member was unable to relate to and cooperate with other team members, she frequently appeared in an agitated state, she was out of touch with reality, had hallucinations and believed officials were plotting against her. It was in Kochman, that the court construed N.J.S.A. 18A:16-2 to include the words "harmful" and "significant" as modifiers to "deviation from normal . . . mental health." "Harmful" refers to harm to children. "Significant" refers to the magnitude of the deviation. When the conduct described is not so irrational and bizarre that reasonable men could differ regarding it, and when no physician or psychiatric corroboration is offered to support a Board's position, analysis of the conduct in light of the two different qualities addressed by the modifiers should be of assistance.

Frequent absences are harmful if they interrupt the continuity of instruction. Frequent absences of a male and female teacher at the same time may give rise to gossip in a high school setting. In no way can I see any deviation from normal mental health in such conduct, though it may evidence misuse of sick leave.

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The insubordination episode in which petitioner, as coach, refused to reinstate students to the team because the students had been placed in an alternative classroom in lieu of suspension as a disciplinary measure was directly contrary to school policy and the orders of his superiors, but Punko's reason for doing so was his firmly held principle that students exhibiting conduct requiring severe disciplinary sanctions should not be playing ball. This was not an irrational position or one harmful to students in general; quite the contrary, a reasonable man might agreed with Punko's position. Petitioner simply disagreed so strongly with Board policy that he was insubordinate. I can see no deviation from normal mental health in Punko's action.

When Punko went through a student's confidential file to see what excuse the student had given for his absence, he had no intention of disseminating confidential information and did not do so. Had he done so, it would have clearly been harmful. It could be argued that his simply viewing such information was harmful. There was one single incident concerning one student, however, and Punko revealed the information only to his superiors when required to so do to explain his actions. Again, the reason for Punko's conduct should be considered in determining whether there was a significant deviation from normal mental heath. The student had openly and repeatedly lied to Punko when asked to explain his absence and failure to go to the attendance office. The circumstances were such that under existing rules, the student could have been and perhaps should have been disqualified from playing on the team that night. Punko's supervisor said he would take care of the problem with the student, but he made no explanation of the result. Punko's action was essentially an investigation of his superior's conduct, but his rationale was maintenance of the integrity of the rules concerning team sports and team membership. To that end, he was insubordinate. Punko's conduct was not irrational. I can see no deviation from normal mental health because his action was rational, though insubordinate. There was some theoretical harm in that he had knowledge of one student's confidential file, but the harm has already occurred and the conduct is not likely to be repeated.

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I CONCLUDE none of the three kinds of conduct cited by the Board in its notice evidences harmful significant deviation from mental health within the meaning of N.J.S.A. 18A:16-2. While I CONCLUDE that the item "etc." in the notice, even though additional items alluded to by "etc." were addressed in the hearing before the Board, is completely insufficient as notice of such items, I will address them because if a reasonable man would view the additional conduct as dangerous to students, I would feel compelled to consider it. The mere failure of appropriate notice of all questionable conduct in a writing should not weigh more heavily than the safety of school children.

Little is known about some of these events. Punko admitted that at one time he was angry enough to kick or punch a hole in a door. Petitioner is a physical education instructor, a nonverbal area of instruction as distinguished from a subject area in which superior fluency in verbal communication is the norm. If frustration or anger resulted in physical action on one occasion from a person whose customary action is physical, it hardly seems a deviation from normal mental health. No harm was shown, except to the door.

Petitioner chewed tobacco and spit in a wastebasket in the classroom. The Board did not allege that students were present and no harm, therefore, was shown. The conduct stopped a year or more before the Board's notice. The conduct would be considered repulsive to many people, but a reasonable man would not find the chewing of tobacco (and the necessary spitting of it out) a deviation from normal mental health. A reasonable man might even be aware that some major sports figures, particularly baseball players, frequently chew tobacco. Similarly, a reasonable man would not view smoking a cigar or holding it in one's mouth within the sight of students as a deviation from normal mental health.

A reasonable man would not view the wearing of shorts by the coach in bitter cold weather as a deviation from normal mental health. Rather, he might see that conduct as an exhibition of physical stamina in an athletic instructor similar to the frequently televised icy swim of members of the Polar Bear Club.

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As for wearing a hat in school contrary to the dress code, it was either bad manners or insubordination. In the same class of conduct is tearing up memos and throwing them in the wastebasket and wearing a hat and smoking a cigar at a grievance proceeding before the Baord. It is disrespectful in a way calculated not to elicit a charge of insubordination. Intense and repeated conduct of this kind could conceivably rise to the level of conduct unbecoming a teaching staff member, but instances of it certainly do not indicate a deviation from normal mental health. In the opinions expressed by the superintendent and principal there appears to be a failure to make the distinction between unprofessional conduct which is "harmful" in that it provides a bad model for students and deviation from normal mental health which could result in physical or mental harm to students. Disrespect for authority, insubordination and bad manners must also be distinguished from deviation from normal mental health. A fair and reasonable man might view such conduct as unprofessional and bad role modeling, but in this case, all of the conduct taken together does not demonstrate any significant deviation from normal mental health or suggest the possibility of physical or mental harm to students. I so **CONCLUDE.**

I am somewhat concerned with the affidavit of the Board member who relates petitioner's conduct on two occasions before the Board. She states that petitioner's appearance, demeanor and expressions caused her to conclude that a psychiatric examination was warranted. It is not possible to assess this evidence because I did not see the conduct and it is not meticulously described, except with respect to the wearing of a hat and smoking a cigar. The transcript of one meeting is in the record and I can see nothing unusual in it. Furthermore, as has been said so often about psychiatrists in criminal or civil commitment causes when they predict that a subject will not be harmful to himself or others, even an expert's prediction may prove to be wrong. A fair and reasonable man's judgment may also prove wrong, but must be relied upon in these circumstances.

It is therefore **ORDERED** that the Board cease from requiring Michael Punko to submit to a psychologcial examination grounded on the reasons discussed herein.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 14, 1986
DATE

Naomi Dower-LaBastille
Naomi Dower-LaBastille, ALJ

MAR 18 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 19 1986
DATE

Mailed To Parties:
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MICHAEL PUNKO, PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE CITY OF RAHWAY, UNION COUNTY, RESPONDENT.	:	

The record and recommended decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a and b.

Petitioner agrees with the ALJ's conclusion that he not be compelled to undergo a psychiatric examination. However, he excepts, for the record, to her decision to consider matters outside the scope of the statement of the reasons, arguing a board should not be allowed to use "etc." as a catch-all for any incident the board chose to dredge up from the past.

The Board points out, for the record, that it also requested summary judgment in its favor and argues that the facts fully support that petitioner's activities cried out for a psychiatric examination. The Board refers the Commissioner to its supporting briefs to the motions filed. It makes specific reference to Gish, supra, arguing that a psychiatric examination takes nothing from a teacher but his time and does not deprive him of a privilege. Further, it contends, inter alia, that the presumption of validity of Board action must be seriously considered.

Upon review of the record in this matter, the Commissioner adopts the recommended decision of the Office of Administrative Law for the reasons expressed therein. However, he disagrees with the ALJ's comments and conclusion, ante, with respect to the alleged kick or punch to a door. The fact that petitioner is a physical education teacher has no bearing whatsoever on any conclusion to be drawn from the allegation. Further, he cannot agree that physical education is a "nonverbal area of instruction." Even though it deals with instruction in physical activities, it requires no less fluency in providing such instruction than any other subject matter. Notwithstanding the above, the Commissioner determines that the incident, which was apparently an isolated one and which allegedly occurred "a long time ago," does not provide sufficient basis for requiring a psychiatric examination at this point in time.

The Commissioner also determines that the ALJ addressed the issue of the use of "etc." in the letter of notice to petitioner in an appropriate manner. Therefore, he fully supports her conclusion and rationale for such conclusion as expressed, ante, in the recommended decision.

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Accordingly, the Commissioner orders that the Board comply with the directive to cease requiring petitioner from undergoing psychological/psychiatric examination grounded on the reasons it advanced during these proceedings.

COMMISSIONER OF EDUCATION

May 2,1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6760-85
AGENCY DKT. NO. 325-9/85

ROBERT GONZALEZ,
Petitioner

v.

BOARD OF EDUCATION OF THE
CITY OF UNION CITY,
Respondent

Peter Wint, Esq., for petitioner
(Katzenbach, Gildea & Rudner, attorneys)

Allen Susser, Esq., for respondent
(Fischer, Kagan, Ascione & Zaretsky, attorneys)

Record Closed: March 5, 1986 Decided: March 19, 1986

BEFORE WARD R. YOUNG, ALJ:

Petitioner alleged the action of the Union City Board of Education (Board) in nonrenewing his employment as a custodian was in violation of his tenure and seniority rights, an abuse of its discretionary authority, and a breach of its negotiated agreement. He seeks reinstatement and to be made whole.

The Board denies the allegations and avers its action was a proper exercise of its discretionary authority.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant N.J.S.A. 52:14F-1 et seq. on October 24, 1985. A prehearing conference was held on December 9, 1985, at which the parties agreed to put forth good faith efforts to stipulate all relevant and material facts to enable a submission for summary decision. The parties succeeded in their efforts and submitted briefs. The record closed on March 5, 1986, the date established for the filing of petitioner's optional reply, which was filed.

The relevant stipulated facts that follow are adopted herein as FINDINGS OF FACT:

1. Gonzalez was employed by the Board as a custodian on August 2, 1982 for a fixed term through June 30, 1983.

2. The employment contract of Gonzalez was renewed for the fixed term from July 1, 1983 through June 30, 1984.

3. The Gonzalez contract was again renewed for the fixed term from July 1, 1984 through June 30, 1985.

4. The employment of Gonzalez was terminated at the expiration of his fixed term contract on June 30, 1985.

5. The termination of employment was not related to either the job performance or behavior of Gonzalez.

6. At the time of the termination of the employment of Gonzalez, other custodians who had worked more than 45 days but less than 35 months (total employment of Gonzalez) were renewed.

7. The employment of Gonzalez was subject to the terms and conditions incorporated in collective bargaining agreements between the Union City Education Association and the Union City Board of Education.

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The Board adopted a policy on May 30, 1984 concerning non-instructional employees which states as follows:

> It is the policy of the Board of Education that upon the effective date of this policy janitorial-maintenance personnel including supervisors be employed on an annual contract basis only with the proviso that renewal is a prerogative of the Board.
>
> It is not the intent of the Board to provide tenure status to any janitorial-maintenance employee or to any other employee for whom tenure provision is not made in law. (See R-1)

THE NEGOTIATED AGREEMENT

Article 9E states:

> All full time non-instructional staff will be considered permanent employees after the forty-fifth (45th) day of their employment and will then be eligible for pension rights.

Article 16B states:

> In the event of a departmental or work location reduction in force, including reductions caused by the discontinuance of a facility or its relocation, the employees shall be laid off in the reverse order of seniority of the employees in the department involved . . .

THE STATUTORY SCHEME

N.J.S.A. 18A:16-1 states:

> Each board of education, subject to the provisions of this title and of any other law, shall employ and may dismiss a secretary, . . . and such . . ., janitors and other officers and employees, as it shall determine, and fix and alter their compensation and the length of their terms of employment.

N.J.S.A. 18A:17-3 states:

> Every public school janitor of a school district shall, unless he is appointed for a fixed term, hold. . . employment under tenure. . . .

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N.J.S.A. 18A:17-4 states:

> No board of education shall reduce the number of janitors, janitor engineers, custodians or janitorial employees in any district by reason of residence, age, sex, race, religion or political affiliation and when any janitor, janitor engineer, custodian or janitorial employee under tenure is dismissed by reason of reduction in the number of such employees, the one having the least number of years to his credit shall be dismissed in preference . . .

DECISIONAL LAW

The validity of the negotiation of tenure if not granted or forbidden by statute was upheld in Plumbers and Steamfitters Local No. 270, Carpenters Local No. 65 and Painters Local No. 144 v. Woodbridge Bd. of Ed., 159 N.J. Super. 83 (App. Div. 1978).

It has been held more recently that a collective bargaining agreement was not in derogation of the statutory scheme regulating the tenure of custodians. Wright v. Bd. of Educ. of City of East Orange, 194 N.J. Super. 181 (App. Div. 1983), aff'd. 99 N.J. 112 (1985).

The N. J. Supreme Court also stated in In re IFPTE Local 195, 88 N.J. at 403-04 quoting State Supervisory Employees, 78 N.J. at 80 that "[n]egotiation is preempted only if the 'statutory or regulatory provisions . . . speak in the imperative and leave nothing to the discretion of the public employer'."

ARGUMENTS OF COUNSEL

Gonzalez relies on Wright in support of his contention that his termination by the Board violated his tenure as well as his seniority rights, and refers to Articles 9E and 16B of the negotiated agreement (J-2).

The Board argues for a distinction of the instant matter from Wright in that Article 9E does not confer a status of tenure after 45 days, but merely provided a vesting

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period before certain employees will become eligible for pension rights, and that the Board's intent relative to tenure acquisition by custodians is clearly expressed in its policy. See R-1.

Gonzalez rejects the Board's contention and counters with the argument that if Article 9E was solely intended to provide pension benefits, it could have been more simply worded. Gonzalez further argues that the term "permanent" is synonymous with "tenured employee," and cites Woolley v. Hoffman — LaRoche, 99 N.J. 284, 289-301 (1985). Gonzalez also argues that the Board's policy statement (R-2) is irrelevant as it was adopted on May 30, 1984 after his 45 day period ended and his status as a permanent employee vested on September 16, 1982.

The final argument of Gonzalez rests on Article 16B in support of his contention that his seniority right was violated regardless of the tenure issue and refers to an excerpt of the minutes of the Board's April 26, 1985 for verification that a reduction in force had indeed occurred.

DISCUSSION, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

It cannot be disputed that the employment of Gonzalez was for fixed terms. Tenure acquisition pursuant to N.J.S.A. 18A:17-3 is therefore prohibited.

The record is absent of claim that the Gonzalez termination was for reason of residence, age, sex, race, religion or political affiliation. No violation of N.J.S.A. 18A:17-4 can hold muster for statutory protection of seniority unless it is determined that Gonzalez has acquired a tenured status through the negotiated agreement. In the event no such determination is made, seniority protection for a non-tenured custodian must be found in the negotiated agreement.

I agree with Gonzalez that Article 9E could and should have been more clearly worded. The intent of the agreement must therefore be determined in the presence of ambiguity or clarity deficiency. It appears that the term "permanent" was incorporated

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for pension purposes and must not be construed to be synonymous with tenure. The Board's intent was indeed clarified in its May 30, 1984 policy adoption. The argument of irrelevancy must be rejected in light of the fact that the adoption occurred over one year prior to the Gonzalez termination, and is corroborative of the intendment determined herein. The Woolley matter is distinguishable in that a stipulation of his employment was for an indefinite period, and the dispute centered on a policy manual of the company.

Seniority indeed attaches to non-tenured custodians in relation to a reduction in force pursuant to Article 16B of the negotiated agreement. A careful reading of the resolution of the Board adopted at its April 26, 1985 meeting is insufficient proof that a reduction force had indeed occurred. The resolution merely authorizes and directs the secretary to send non-renewal notices in light of budgetary uncertainties in order to be in compliance with N.J.S.A. 18A:27-10. Gonzalez has not met his burden of proof that a reduction in force in fact occurred, which would have effectively triggered the applicability of Article 16B.

The issues of tenure acquisition and seniority protection by statute and the negotiated agreement have been argued by the parties and addressed herein. It must be noted, however, that the issue framed at prehearing incorporated the alleged abuse of discretionary authority by the Board in its termination of the employment of Gonzalez.

In light of the stipulation that Gonzalez was not terminated because of behavior or job performance and that petitioner has not met his burden of proof that a reduction in force occurred, the reason for the Board's termination action is left to pure conjecture. Conjecture is insufficient, however, to set the Board's action aside. Notwithstanding the undisputed fact that the Board's action may be set aside if found to be arbitrary, capricious, or unreasonable, the standard of proof to be applied is a preponderance of credible evidence. That burden has not been met by the petitioner herein.

In summary, I **FIND** that Robert Gonzalez is not tenured pursuant to statute or the negotiated agreement. I **FURTHER FIND** that Robert Gonzalez is not afforded seniority protection as a non-tenured custodian in the absence of a reduction in force.

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I CONCLUDE, therefore, that summary decision is GRANTED to the Board and DENIED to Robert Gonzalez. IT IS ORDERED, therefore, that the Petition of Appeal shall be and is hereby DISMISSED.

This recommended decision may be affirmed, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE this Initial Decision with Saul Cooperman for consideration.

19 March 1986
DATE

WARD R. YOUNG, ALJ

MAR 20 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

MAR 20 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

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ROBERT GONZALEZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF UNION CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner excepts to the whole of the initial decision which found that his seniority and tenure rights were not violated by the Board's termination of his employment as a custodian. Petitioner avers the initial decision must be reversed because the ALJ misapplied and misinterpreted the controlling law and facts. Specifically, petitioner avows the ALJ was in error in not determining that the Board violated the terms and conditions of the tenure and seniority provisions of the collective bargaining agreements that were in effect throughout the entire length of his employment by the Board. Petitioner cites Wright v. Bd. of Ed. of the City of East Orange, 99 N.J. 112 (1985), as he did in his post-hearing brief, for support of his position that the clear language of the collective bargaining agreement mandates that the Commissioner reverse the ALJ's findings.

Further, petitioner's exceptions raise an argument that was contained neither in the pre-hearing order for this matter nor in petitioner's post-hearing brief. Petitioner avers that the factual basis of the ALJ's ruling was incorrect in his determining that the seniority provision of the Agreement, Article 16B, was inapplicable because no reduction in force had occurred. Petitioner contends that the ALJ's finding in this regard is refuted by the Board's own resolution, Exhibit P-1. Petitioner disagrees with the ALJ that this resolution "***merely authorizes and directs the secretary to send non-renewal notices in light of budgetary uncertainties in order to be in compliance with N.J.S.A. 18A:27-10." (Initial Decision, ante) Petitioner further avers that a review of the Board's resolution reveals that a substantial number of nonprofessional and professional positions, including petitioner's, were eliminated as a result of economic uncertainty within the school district. Therefore, petitioner argues, "there can be no doubt that the petitioner was RIF'd by respondent." (Petitioner's Exceptions, at p. 13)

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The Board's reply exceptions state initially that it objects to petitioner's characterization of the resolution dated April 26, 1985. The Board contends the resolution cannot "only be characterized" (Exceptions, at p. 3) as a reduction in force and was not characterized as a reduction in force in the Stipulation of Facts submitted to the court. Respondent argues:

> In fact, there were no facts before the court to indicate that the petitioner was terminated because of a reduction in force. The Resolution, as indicated by Judge Young in his Initial Decision, 'merely authorizes and directs the Secretary to send non-renewal notices in light of budgetary uncertainties in order to be in compliance with N.J.S.A. 18A:27-10'***
> (Board's Reply Exceptions at p. 6, quoting the Initial Decision, ante)

The Board's response to petitioner's Exception 1 draws attention to the difference in language between the collective bargaining agreement in Wright, supra, and the one in the present case. The Board avers that in Wright, the bargaining agreement, specifically, on its face, grants tenure to all members of the bargaining unit. However, argues the Board, the Agreement in the present case is far from clear and, on its face, merely provides a vesting period before certain employees will become eligible for pension rights.

In response to petitioner's Exception 2, the Board avers that the mere submission of a Board resolution was insufficient proof that petitioner was not renewed because of a reduction in force. Since petitioner did not prove a reduction in force, the language of Article 16B of the Agreement did not come into play, contends the Board. Thus, the determination of the ALJ that petitioner did not meet his burden of proof in proving that a RIF occurred was appropriate. The Board contends that its resolution stated nothing other than that certain employees were sent nonrenewal letters in light of possible budgetary considerations, in compliance with N.J.S.A. 18A:27-10.

Having reviewed the record herein, the Commissioner concurs with the determination of the ALJ that the Wright case is inapposite to the case herein because the language assigning tenure to the employees in the Wright case was unequivocal. The Commissioner is convinced, as was the ALJ, that in the matter herein Article 9E is somewhat less than perfectly clear. Applying the same standard of review as the ALJ, that is, that in the presence of ambiguity or clarity deficiency, the intent of the agreement must be determined, it is evident that the word "permanent" as contained in Article 9E is not synonymous with "tenured employee". Rather, "permanent" suggests that custodial employment, after 45 days, shall be "steady" as compared to "temporary", and further that following the 45 days, such employee is vested with eligibility for pension rights. The

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Commissioner concurs with the ALJ's determination that the Board's intent relative to tenure acquisition by custodians is clearly expressed in its policy. See R-1.

Having established that petitioner's employment was for fixed terms, he might still be entitled to hold his position on the basis of seniority, pursuant to Article 16B of the Agreement between the Board and the custodial staff. However, seniority does not vest until such time as there is a reduction in force. The Commissioner agrees with the ALJ that the resolution passed by the Board on April 26, 1985 is insufficient proof that a reduction in force had indeed occurred. "The resolution merely authorizes and directs the secretary to send non-renewal notices in light of budgetary uncertainties in order to be in compliance with N.J.S.A. 18A:27-10." (Initial Decision, ante) The issue of whether a RIF actually occurred was not made a part of the pre-hearing order, nor were such arguments addressed by the parties in their post-hearing briefs. Further, the Commissioner's review of the record herein reveals that the Joint Stipulation of Facts indicates that petitioner's termination was not related to his behavior or job performance. (Initial Decision, ante) Also, the record is "absent of claim that petitioner's termination was for reason of residence, age, sex, race, religion or political affiliation." (Initial Decision, ante) If such is the case, and neither was there a reduction in force, it is unclear upon what basis petitioner was in fact terminated.

Accordingly, in the interest of a full and fair development of the record herein, the instant matter is remanded to determine whether a reduction in force actually occurred following the Board's resolution of April 26, 1985, and if so, whether petitioner is entitled, by virtue of seniority and Article 16B of the Agreement, to remain in the employ of the Board.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3461-85
AGENCY DKT. NO. 146-5/85

ROSEMARIE COSTA,
Petitioner,
v.
LONG BRANCH BOARD OF EDUCATION,
Respondent.

Thomas W. Cavanagh, Jr., Esq., for petitioner (Chamlin, Schottland, Rosen, Cavanagh & Uliano, attorneys)

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: February 4, 1986 Decided: March 21, 1986

BEFORE **BRUCE R. CAMPBELL**, ALJ:

Rosemarie Costa (petitioner) seeks an order reinstating her in the position of school psychologist in the Long Branch public schools with back pay and emoluments accordingly, and declaring that she has gained a tenured status in that position.

The Long Branch Board of Education (Board) denies that the respondent has or is entitled to tenure status and asks that the petition of appeal be dismissed.

The matter was joined before the Commissioner of Education, who transmitted the matter to the Office of Administrative Law on June 7, 1985, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on July 15, 1985, at which, among other things, it was agreed that the issues to be tried are

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whether the petitioner has acquired a tenured status in the respondent's schools and, if so, to what relief she may be entitled. It was further agreed that even if the petitioner has not achieved a tenure status, she asserts a claim that her nonrenewal was arbitrary, capricious or improper.

It was also agreed at the prehearing conference that the parties would cross-move for partial summary judgment on that portion of the pleadings that alleges the petitioner has acquired a tenure status. The parties timely filed papers and on November 4, 1985, an order issued granting the motion of the Board for summary judgment in its favor on the issue of tenure status.

The matter was heard on November 18 and 19 and December 12, 1985, at the Asbury Park Municipal Complex.

I.

Certain facts, adopted in the order on summary decision referenced above, are not disputed and reveal the context of the case:

1. The petitioner was regularly employed from September 1980 - June 1981 as a school psychologist. She was paid according to the salary schedule then in effect.

2. On April 29, 1981, she was given notice that she would not be rehired because of budgetary restraints.

3. As soon as funding was acquired, the petitioner was rehired and regularly employed as a school psychologist for the period September 1981 - June 1982. She was paid at the appropriate step of the salary schedule then in effect.

4. On April 29, 1982, the petitioner was given notice that because of budgetary restraints she would not be rehired for the 1982-83 school year.

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5. On April 30, 1982, a tenured and more senior school psychologist signed and returned to the Board a statement of intent to return for the 1982-83 school year.

6. On August 1, 1982, this employee requested a maternity leave for the period November 22, 1982 - June 30, 1983. This was approved by the Board on August 18, 1982.

7. The petitioner was employed from October 25, 1982 - June 17, 1983, a period of approximately seven and one-half months, as a substitute for the senior psychologist on leave.

8. During this time, the petitioner was paid on the substitute salary schedule for 21 days and at the place on salary guide corresponding to her experience, prorated, for the rest of the school year, in accordance with Board policy.

9. On May 4, 1983, the more senior school psychologist requested an extension of her maternity leave to cover the periods September 1, 1983 - June 30, 1984. This was approved by the Board on May 19, 1983.

10. On August 17, 1983, an excerpt of Board minutes shows the petitioner was appointed school psychologist at step four of the appropriate salary schedule replacing "Randi Vodofsky who is on maternity leave of absence."

11. The petitioner served from September 1, 1983 - June 30, 1984, as school psychologist and was paid at the appropriate step on the salary schedule then in effect.

12. On or about June 5, 1984, the more senior school psychologist resigned her position.

13. The petitioner was regularly employed from September 1, 1984 -June 30, 1985, and was paid according to the salary schedule then in effect.

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14. On or about April 29, 1985, the Board decided not to renew the petitioner's employment contract.

The petitioner was regularly employed from September 1980 - June 1982. She received notice in April 1982 that she would not be given a contract for the 1982-83 school year and, indeed, she received none. During the summer of 1982, a tenured school psychologist requested and received a maternity leave for less than the full 1982-83 academic year.

By letter dated October 29, 1982, an assistant superintendent notified the petitioner of her appointment as an interim substitute for the more senior school psychologist. The letter states the petitioner would assume her duties on October 25, 1982. It further sets forth her rate of compensation as being $30 per day for days 1-8, $35 per day for day 9-20 and for days 21 and following, "M.A. plus 30, Step 3, $15,131."

The last paragraph of the letter states, "As you know, Mrs. Vodofsky is on maternity leave of absence. Your assignment as an interim substitute will be until she returns or June 17, 1983, whichever comes first. In the interim, I wish you an enjoyable and rewarding experience during this period."

II.
RELEVANT EVIDENCE

The petitioner testified as to her employment history. Her testimony was consistent with the facts set forth above. She stated that she had performed well under two previous supervisors. She experienced problems, however, under her last supervisor.

The petitioner believes that because she initiated a grievance in October 1984 concerning observations and evaluations, the supervisor did not give her adequate credit for the work she performed. A series of meetings with the supervisor followed. In November 1984, she met with the supervisor alone. On December 6, she met with the supervisor, the assistant superintendent and one other person. Still another meeting was held with special services staff and the assistant superintendent but failed to address procedures the supervisor followed. Still later, the supervisor called her in. At her request, the school social worker was present at the meeting. The supervisor criticized the petitioner's handling of certain details concerning preschool handicapped children.

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The petitioner believes she began to have problems as soon as the supervisor arrived in the district. In a September 1983 meeting with the supervisor, he stated he wanted to observe nontenured staff. He suggested that he sit in during a testing the petitioner would conduct. She stated she was not sure that she could ethically agree to this. Because she was not sure, she wanted to check. The witness stated she was advised that if the supervisor wanted to watch the testing, his observation should be accomplished through a two-way mirror, not with him present in the room.

The petitioner told her supervisor about her concerns and that she had contacted a person in the State Department of Education on the question. That person had suggested that both the petitioner and her supervisor write to the Department on the question. Subsequently, she received a memo from her supervisor saying his presence during the testing was not a problem as he was an administrator.

The witness testified that following this incident she began to receive threats. She began to be concerned about how the supervisor spoke to her. The relationship between them deteriorated rapidly. In November 1983, his evaluation said nothing substantive about the petitioner. A few days later, she received typed evaluation forms covering some things not covered in the post-evaluation meeting with the supervisor. The supervisor asked her to sign off on the evaluation forms.

The petitioner stated she wanted to "keep the record straight" as to what was being said and how it was being said. She resorted to using a tape recorder in meetings with her supervisor. Conferences with the supervisor subsequently changed. The supervisor's tone of voice and choice of words improved.

In her evaluation dated October 26, 1984 (P-3), reference is made to her professional attitude and to the chain of command. She states she received no other document concerning chain of command.

There was an incident in which the petitioner requested immediate intervention. Her supervisor told the petitioner that a new work-up would be necessary. The petitioner disagreed and stated it was not proper because a work-up had been done on the child the previous summer.

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The petitioner contacted the county office of the State Department of Education. She reported this to her supervisor and discussed the question with him again saying it was expedient. She had other cases where children were seemingly misbehaving and to "redo our cases was not expedient and efficient." The supervisor insisted that observations be performed before any further action was taken on the particular child. He insisted that the parents' signatures be secured. The petitioner stated that it was not necessary but the supervisor insisted that it was. He directed that the parents' signatures be secured and they were.

The petitioner testified concerning her May 11, 1984 evaluation and rebuttal (P-4). On May 1, her supervisor told her that they would meet with the assistant superintendent on May 8. She said her first responsibility was to a case conference on that date concerning a handicapped pupil. The supervisor insisted she attend the meeting with the assistant superintendent. Petitioner replied, "I told him that was not acceptable, that I would meet him afterwards. As soon as the meeting was concluded I would be there."

The petitioner also testified as to differences of opinion with her supervisor on several points. She stated that on at least one occasion, when she asked for clarification of something the supervisor had raised, she never received it. On her evaluation of April 23, 1984 (P-5), it is stated that she should be more tactful with administrators but this remark is not explained. Again she got no further clarification, either written or oral.

The petitioner's evaluation of November 22, 1983 was admitted (P-6). It contains two references to instructional services. The petitioner states that she asked her supervisor for clarification of the remarks and he replied, "I've been as specific as I can be." Concerning her alleged reluctance to cooperate, the supervisor offered no explanation. The document actually states, "Rose, at times, seems reluctant to cooperate. This mannerism is of concern to this administrator." Ibid. At the foot of the first page the document states, "Rose is concerned and professional; perhaps her aloofness is being interpreted as reluctant." Ibid.

On May 22, 1984, the principal of the Anastasia School sent a memorandum to the Pupil Personnel Services Director, the petitioner's supervisor. The memo states:

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> This will confirm our conversation in my office a few weeks ago, in that I felt it was presumptuous of Mrs. Costa to indicate to a substitute teacher hired for covering of classes for PPS conferences that it was "ok" for her to leave the building and take an extended lunch hour due to the fact that the appointment with the next parent was cancelled. In investigating the situation, I did find out that she also stated to the substitute teacher, "Of course, you would have to check with the Principal."
>
> I realize that her intent was humanistic; however, I feel decisions such as this type should lie with the Building Administrator. I have no other specific comments to make at this time relative to Mrs. Costa's performance.

The witness stated that she only vaguely recalls the incident. She and her supervisor never discussed the incident nor did she discuss it with the building principal.

The witness also stated that she was aware of no evaluations or observations done by the supervisor in which he says that her performance was such that it might prevent her from obtaining tenure. The petitioner stated the supervisor never called to her attention that her academic performance, her performance with children or her performance as a school psychologist was a problem. The witness then stated that in February 1985, the supervisor did inform her her job was in jeopardy "but no specifics were provided, or what I was provided with was misinformation." The reasons the supervisor gave had to do with administrative chain of command situations. They did not have to do with her performance as a school psychologist. The witness stated that her supervisor never indicated her performance was such that there was a question as to whether or not she would receive a tenure contract. The witness also stated the superintendent never informed her that the Board had a policy that "merely adequate" personnel would not receive tenure.

Exhibit J-1, a memorandum from the supervisor to the assistant superintendent, dated April 23, 1985, seems to be a summary of the supervisor's observations, both formal and informal, of the petitioner and a recommendation to the assistant superintendent that her contract not be renewed for the 1985-86 school year. The document discusses professional attitude, only adequate performance of duty, not following the chain of command and challenges to the director's authority. Several documents are attached that appear to support the conclusions of the supervisor. One is a memorandum to the petitioner concerning a child, N.C., dated September 18, 1984. Another is the memorandum of the Anastasia School principal already adverted to and the

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last is a summary of the conference held on May 8, 1984, with the assistant superintendent, the petitioner and the supervisor. The latter document was written by the supervisor.

The petitioner iterated that her supervisor appeared annoyed because she consulted her teachers union. She also stated she requested tenure and district policy information from him but never received it. Concerning J-2, a recommendation of the assistant superindent to the superintendent that the petitioner's contract not be renewed, the petitioner stated she does not know what the assistant superintendent means about problems with relations and performance because she never received anything in writing from anyone concerning these points.

On cross-examination the petitioner stated that she believed compliance with rules and regulations governing special education were more important than agreement with her supervisor. When the question of the supervisor observing testing arose, it was she who contacted the State Department of Education (R-1). A two-way mirror would have been best, but this is not usually available. She ultimately conducted testing with the supervisor present.

The petitioner states she carried out all the supervisor's directives. She did question some of them, however. Some of these questions showed up in rebuttals she wrote to evaluations. She initiated a grievance over an adequate rating. The grievance went to the Board level. The Board did not change the evaluation after hearing the grievance. The petitioner agrees her competence is reflected, in part, in her dealings with superiors.

There were incidents with a former supervisor, but the petitioner did not see fit to talk to the assistant superintendent concerning these. The petitioner says the characterization of her service as merely adequate was without substance. She believes even the positive comments made about her needed amplification. She needed to tape record meetings with her supervisor because she was given directives but they were often changed. When she requested the changes in writing, the request was denied. The petitioner believed she was threatened.

She wrote her rebuttal to R-1 within a few days of the evaluation. This was after she had initiated the grievance, but before receiving a nonrenewal notice. She

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believed the supervisor's intent was not to help her improve but to "get" her. The petitioner stressed she did not know that merely adequate performance was not good enough for renewal. Her supervisor never told her what someone else was doing that was more than adequate.

The school social worker testified that she was evaluated by the same supervisor. She testified as to certain difficulties she perceived between herself and the supervisor. It was her opinion that the atmosphere in the pupil personnel services unit was such as to prevent raising questions about evaluations. She also believed the supervisor had Administrative Code interpretation problems. The Code is in a constant state of change. There have been problems of interpretation by other persons as well.

The teachers union president testified. He stated that during the week of March 11, 1985, he was having meetings daily with the child study teams concerning the supervisor. On or about March 18, he sent a letter to the superintendent indicating problems of morale and questioning the confidence of the supervisor. The staff complained of a lack of organization and of leadership.

When he did not receive a response immediately, he called the assistant superintendent. A meeting was then called at which 10 or 12 persons were present. Some two dozen concerns were raised. The emotional level of the meeting was high. The assistant superintendent noted the concerns raised and agreed to a second meeting at which he would respond after looking into certain of the concerns raised.

The staff had been reluctant to go to administration sooner because they had in the past worked out similar problems without resort to administrators.

A second meeting was held. The same persons were present with the addition of the superintendent and the supervisor. The assistant superintendent tended to support the supervisor. The superintendent did not speak. The staff did not hold back and made known its many concerns. This witness believed the staff wanted to work with the supervisor for the good of the system. At the end of the meeting, the union president asked the superintendent what would happen next. The superintendent replied that the answer would be forthcoming in a few days. At the next public meeting of the Board, the supervisor's resignation was announced.

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The assistant superintendent testified. He knows the petitioner and he made the recommendation concerning her nonrenewal in 1985 (J-2). The basis for his recommendation was, in part, the supervisor's recommendation. His own observations and contacts with the petitioner also came into play. He had had contacts with her for approximately five years.

The assistant superintendent recalled an incident several years ago in which a former supervisor complained that the petitioner had "quite viciously" attacked him verbally. The assistant superintendent also recalled the original recommendation for the petitioner's hire by still another former supervisor. The recommendation stated, "might have difficulty with relationships."

After the last supervisor was hired, the assistant superintendent became aware of friction between him and the petitioner. He had meetings with them both. The assistant superintendent stated that "the totality of the person goes into the recommendation." The petitioner showed some abrasiveness at times. An observation the assistant superintendent made late in 1984-85 also was taken into account (R-4).

It is Board policy that personnel having problems or facing the possibility of nonrenewal be observed by central office personnel. R-4, as it went to management, also affected his decision. He expressed at that time some concerns as to the whole child study team. The petitioner was case manager at that time. R-4 was part of the materials presented to the Board concerning the petitioner's nonrenewal. Exhibits R-5, formal grievance complaint from Costa, R-6, grievance appeal of the principal's decision to the superintendent, and R-7, a request for Board review of the superintendent's grievance decision, were admitted for the limited purpose of showing Board contact with the petitioner and hence an opportunity to form an opinion of her and an opportunity for the Board to review the supervisor's observations and evaluations. The assistant superintendent was present when the decision not to renew the employment of the petitioner was made (R-8).

The assistant superintendent also stated that the petitioner was rehired when the more senior school psychologist resigned even though there were some reservations about her adequacy. He stated that school psychologists are hard to find. The petitioner was available and knew the district. Supply was far less than demand and the district's

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salary scale is not the best in the area. As to why he recommended nonrenewal when he did, the assistant superintendent stated that there had been many attempts to advise the petitioner and improve her performance. She simply "hadn't come along" as they had hoped. He took as many steps as he could, as illustrated by the conferences and meetings already testified to. At that point, with some reservations about her performance, he believed it inadvisable to enter a tenure relationship with the petitioner.

The last supervisor under whom the petitioner served also testified. He is now employed elsewhere. He has no present connection with the Long Branch Board of Education or any employee of the Board. He has been a school social worker and a child study team director in other school districts. He has experience in observing and evaluating all child study team positions, whether held by tenured or nontenured personnel. He supervised and evaluated the petitioner two of the three years he was in the district. The first year he was in the district, the petitioner was a substitute. He was involved in her hire as a regular employee. He interviewed her and recommended her for employment based on her experience in and with the district. He recommended renewal of the petitioner at the end of her first year, June 1984. He did not recommend renewal at the end of the 1984-85 school year (J-1). His testimony concerning her professional attitude level of performance, the chain of command and challenges to his authority was consistent with that already described. He also testified consistently with earlier testimony as to conferences and meetings with staff and administrators. He believes that at least one of those meetings was productive.

The former supervisor stated that he did evaluate the petitioner and he performed several observations in preparation for each evaluation. See R-11 through R-26.

As to the testing incident, he made several calls to the State Department of Education and learned that his presence would be proper.

As is the case with many supervisors, this witness supervised positions in which he had not served. In his former employment he supervised 25 to 30 people, more than 10 of whom were special education personnel and several of whom were social workers. He dealt with four school psychologists in the Long Branch district.

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He iterated his objection to the petitioner's insistance on taping conversations and information sessions with him. He believed taping was not only unnecessary but would hinder communication.

The superintendent testified that he supervises the assistant superintendent and his subordinates. The superintendent knows of the petitioner. His knowledge of her comes from her several years of employment in the district. He has attended meetings and conferences with her. He has reviewed her whole record. He has informally seen her in a variety of settings.

The superintendent recommended the petitioner's nonrenewal to the Board. He met first with the Board personnel committee and later with the full Board. His recommendation was discussed at both meetings. The Board reviewed the whole record and decided not to renew the petitioner's employment. The vote of 9-0 was recorded in public session.

The superintendent wrote a letter under date of May 16, 1985 (J-3) to the petitioner in answer to her request for the reasons for her nonrenewal. Donaldson v. No. Wildwood Bd. of Ed., 65 N.J. 236 (1974). The first reason stated in J-3 comes from a review of observations, evaluations and recommendations. He relied on his interpretation of what these documents said. Point two rests on the same bases. Point three is based not only on the documents but his observations of the petitioner at other meetings, specifically the Board level grievance meeting. The petitioner related to the Board a number of incidents between her supervisor and herself. Her answers to questions at that session gave him an impression of the relationship between her and the supervisor.

The superintendent and other administrators were of the opinion that the petitioner did not hold tenure in the district although the union insisted she did. Therefore, they had to act as if the petitioner were going into her tenure year. Accordingly, the administrators had to consider the petitioner's entire history in the district and think carefully concerning a recommendation for or against a tenure contract.

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III.
PETITIONER'S ARGUMENTS

The petitioner submits that the Board did not have sufficient documentation before it when it reached a decision not to renew her employment and thereby bestow tenure status upon her. Further, the reasons set forth for the nonrenewal are elusive of comprehension. First, the performance of her duties was not considered to be at the superior level desired by the district of personnel being granted tenure. Second, inappropriate professional attitude; that is, taping of conversations without authorization. Third, lack of cooperation with and continued challenges to the authority of the supervisor.

There is little or no specificity provided in the testimony of the superintendent, the assistant superintendent or anyone else. No Board members were produced at the hearing to elaborate on the nature of the Board's deliberations. The petitioner urges that N.J.A.C. 6:3-1.20 requires that the Board provide a nontenured teacher with a statement of reasons for nonrenewal. The regulation also fixes upon the Board a responsibility to correctly label and identify those reasons in the notice. Donaldson, above. If there is no concomitant requirement on the Board to identify and provide the precise and specific reasons for nonrenewal, then the regulation becomes worthless.

The initial reason provided by the Board relates to performance of duties. The document in question specifically states that the petitioner's performance level was not superior as desired by the district for personnel "being granted tenure" (J-3). On its face, the reason is a rather simple declarative sentence that creates the impression the Board considered that the petitioner was in her "tenurable" year. The petitioner also argues that a careful review of the record does not disclose a persuasive introduction by the Board of any documentation or policy that would justify or support the conclusion that the performance level referred to is formally embodied in documentation adopted by the Board. The petitioner also argues that a fair analysis of the reason given as the initial basis for her nonrenewal is simply not persuasive. There is no evidence of Board policy requiring a superior level of accomplishment or even defining how that conclusion would be arrived at. Little or no evidence was offered to demonstrate how the Board arrived at the conclusion that the petitioner's performance was merely adequate.

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The petitioner contends that the testimony at the hearing renders the second reason, professional attitude, totally void. The Board was unable to prove that any unauthorized conversations were taped. The supervisor was aware of all discussions that were taped.

As to lack of cooperation, any weight accorded to the third reason given to the petitioner must be considered in light of the testimony of the two supervisors and the evidence introduced in connection with this situation. The initial significant document upon which the Board relied (J-1) was the recommendation of the former Director of Pupil Personnel Services. This tribunal should examine the experience and background of this administrator in connection with the department that he was asked to supervise. During his testimony, he provided his background and experience, at which time it became clear that his qualifications for holding the position as well as effectively handling the position were at best questionable.

The absence of depth in his experience either in the professions in question or in supervising them previously calls into doubt his ability to effectively evaluate the personnel under him, which of course included the petitioner.

The status of the supervisor's position in the school system during the relevant times and his ultimate resignation at or about the same time as the petitioner's nonrenewal bear examination. At the same time the supervisor was recommending that the petitioner be nonrenewed due to primarily attitudinal problems, much of his department was requested some relief from his leadership on a variety of grounds. The testimony showed that the superintendent indicated he would not recommend the supervisor to be rehired for the coming year, at least partly as a result of the problems in his department.

The petitioner also believes that the testimony shows the assistant auperintendent did not concur with the recommendation to terminate the supervisor and in fact appeared at the Board hearing at which the supervisor's nonrenewal was discussed. The assistant superintendent attempted to convince the Board to rehire the supervisor as Director of Pupil Personnel Services. The assistant superintendent's role as spokesman for the supervisor is significant and necessary in reviewing his subjective evaluation of the petitioner. The petitioner submits that this tribunal should examine the components of the assistant superintendent's recommendation to determine if it should stand as a

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primary reason for the Board's decision. A fair reading of the document in question indicates it to be a boot-strap collection of events, after a conclusion had been reached, in an attempt to obtain apparent support for a preordained conclusion.

The assistant superintendent could relate only one incident involving the petitioner under another supervisor. The reference in definition to that incident is simply out of proportion. The testimony adduced in this matter effectively rebuts the observations and conclusions reached by the assistant superintendent.

The petitioner in this case testified in specific detail regarding the various events involved in this matter. She detailed the reasons for her requests to tape meetings or to have a witness present, the problem with the testing situation, the result of the taping, and other significant circumstances in the matter. She testified concerning her specific rebuttals to the alleged commentaries of the assistant superintendent and supervisor and the circumstances represented therein. Finally, the petitioner submits that the Board simply may not act in an arbitrary and capricious fashion. This entire case is a situation in which a decision was made and then an effort was undertaken to substantiate the decision already reached. The request for relief should be granted.

IV.
BOARD'S ARGUMENTS

The Board asserts that boards of education have an almost complete right to terminate the services of a teaching staff member who has no tenure and is regarded as undesirable by the Board. This point is a quote from the case of Dore v. Bedminister Tp. Bd. of Ed., 185 N.J. Super. 447, 456 (App. Div. 1982). Dore reaffirms the basic principle that local school boards have very broad discretionary authority in the granting of tenure and in the nonrenewal of nontenured teachers. Donaldson, above, makes clear that the local board's broad discretionary authority in granting tenure or in renewing a nontenured employee is an important administrative function because once tenure attaches, there can be no dismissal of the teaching staff member without a showing of inefficiency, incapacity, unbecoming conduct or other just cause, N.J.S.A. 18A:28-5, or a legitimate reduction in force, N.J.S.A. 18A:28-9.

In Dore the Appellate Division discusses the language of Donaldson, stating:

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> Implicit in this language is the recogntion by the court that absent constitutional constraints or legislation affecting the tenure rights of teachers, local boards of education have an almost complete right to terminate the services of a teacher who has no tenure and is regarded as undesirable by the local board.

A local board cannot deny renewal of a teacher's contract because of a teacher's legitimate exercise of the right to freedom of speech or union activities or similar activities.

The notice of nonrenewal is entitled to a presumption of correctness. N.J.S.A. 18A:27-3.2 provides that a teaching staff member who receives notice of nonrenewal may request a statement of reasons for the non-reemployment. This notice must be received on or before April 30 of each year. N.J.S.A. 18A:27-10. This notice, as with any other Board action, is entitled to a presumption of correctness. Quinlan v. North Bergen Tp. Bd. of Ed., 73 N.J. Super. 40 (App. Div. 1962).

The petitioner bears the burden to rebut the presumption of correctness through concrete proof. Moroze v. Essex Cty. Vocational School Dist., 1975 S.L.D. 1103 (St. Bd.).

The petitioner here did not prove that the members of the Board in deciding not to rehire her were arbitrary or capricious. As the superintendent testified, the Board has set procedures when deciding not to renew a nontenured teacher. That procedure involves a recommendation from the immediate supervisor, a recommendation from the assistant superintendent and a review by the personnel committee of the Board. Further, the superintendent makes a recommendation and the full Board decides on those various recommendations while having access to the entire personnel file, including evaluations, observations and employee rebuttals. There was no showing that the procedure used by the Board was arbitrary or capricious. To the contrary, there were many steps and each step was designed to present a complete picture to the voting Board members.

There was a review of the observations and evaluations by the immediate supervisor. There was the completion of a recommendation by the immediate supervisor which referred to various evaluations and observations. There was an evaluation done by the assistant superintendent, a review of the immediate supervisor's recommendation and a recommendation by the assistant superintendent. The recommendations and the

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personnel file were then reviewed by a Board personnel committee with the superintendent present. Following these steps, the Board then had available the recommendations of the assistant superintendent, the immediate supervisor, the personnel committee and the superintendent. It had as well all of the evaluations and observations, all of the rebuttals by the petitioner to each of the disputed evaluations and observations and the balance of the personnel file.

There was no proof submitted that the Board's discussion and vote were done in an arbitrary or capricious manner. At the Board meeting, there was a short discussion concerning the petitioner's employment. The Board had available to it at the time of the discussion and vote at least four recommendations, two of which were written. The Board also had available to it the rather long employment history of the petitioner. Beyond that; certain Board members brought to that meeting a personal knowledge of the petitioner from a previous hearing before them. Given all of this information, the Board unanimously voted not to reemploy the petitioner.

The petitioner did not request an informal hearing before the Board. This is an additional procedural safeguard which the petitioner opted not to pursue. Pursuant to N.J.A.C. 6:3-1.20, an employee has the right, after receiving a list of reasons for non-reemployment, to have an informal appearance before the board. At that hearing, an employee may be represented by an attorney and may present witnesses.

The petitioner also failed to prove that the substantive basis for her nonrenewal was arbitrary and capricious. The letter from the superintendent to the petitioner (J-3) setting forth the reasons for her nonrenewal is quite clear. As explained during the hearing, there was contention by the petitioner and her representatives that she had obtained tenure. The Board, on the other hand, had received legal advice that she did not enjoy a tenure status. Nevertheless, because of the conflict, various members of the administration treated the petitioner as an employee who might obtain tenure if granted a new contract. Further, as the assistant superintendent testified, he evaluated her because of certain problems which had persisted with her performance. One of the Board's stated reasons for her nonrenewal was that her performance was not at the desired level.

The petitioner argues that the statement, "The performance of your duties as School Psychologist was not considered to be at the superior level desired by the District

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of Personnel being granted tenure," is too subjective and not tied to a measurable standard. This is in error. Out of necessity, certain discretion goes into making any employment decision. Each individual on the Board, as with any employer, has his own specific idea as to what he considers to be the type of employee or teacher that the district or business needs to employ. The petitioner has insisted that there is no real and defined standard for superior and, therefore, the decision is too subjective. It is self-evident that each individual teacher or employee of the district will have certain recognized or unrecognized qualities. There may be certain other qualities either learned or personal that some members of a board may consider superior and other members of a board may not consider superior. The petitioner's point that there is no standard as to who is superior is practically impossible to legislate in to a standard. For this reason, the Board or any employer tends to resist set criteria defining superior. That is why nontenured employment decisions are discretionary under State law and case law. Nowhere is it required that such a standard be defined or reduced to writing.

As stated in Donaldson and Dore, both explicitly and implicitly, the granting or denial of tenure is a very important event not only for the employee but for the employer. It is obvious that in giving this possible lifetime arrangement (or even another year of employment), a board must weigh the teacher's performance and subjectively categorize that performance.

The employer must review the totality of its experience with the employee. In this case, the petitioner was previously renewed. With the Board facing the union argument regarding tenure, it could no longer wait for her expected development and decided it would be best if she were not employed with the district because she was not performing at the desired level. Someone has to make a decision on employment. In a school district, the board of education is given that authority. By their very nature, these decisions are both subjective and discretionary.

The petitioner did not present convincing evidence that she was a superior employee. It is quite understandable given the relationship between the supervisor and the petitioner why the petitioner attacks the supervisor. Certainly he was not considered to be of the superior level desired by the superintendent. As the superintendent testified, the supervisor did not receive the superintendent's recommendation for contract renewal. Ultimately, the supervisor resigned because of the superintendent's non-recommendation. It is quite logical that the petitioner would attack the supervisor since he would appear to be the Achilles' heel of the Board in the chain of review of the petitioner.

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Nevertheless, the supervisor was her immediate superior. Nevertheless, the supervisor did have the obligation to evaluate her and observe her. The petitioner did have the right, which she exercised at every opportunity, to respond to the supervisor's various observations and evaluations. As was her right, these responses were attached to her evaluations and observations. These responses were available to the assistant superintendent, to the superintendent, to the personnel committee and to the whole Board. Therefore, the Board had before it a full picture of the petitioner's employment history. The Board was not considering merely a name on a list. The Board was not ignorant of the petitioner's alleged problem relationship with her supervisor. The Board knew her point of view regarding the supervisor's evaluations and observations. The Board had a face and a person in its collective mind when it voted.

The petitioner somehow adds this up and argues, after all of these events and various documents were considered by the Board, the Board was arbitrary and capricious since it could not measure her performance against a written or set criterion for superior work. Despite the fact that the supervisor himself was nonrenewed and the Board could have chosen to disregard his evaluations and observations and to accept the petitioner's rebuttals, the petitioner did not receive one favorable vote. Even with her rebuttal documents and the supervisor's alleged problems, the Board chose not to reemploy the petitioner.

The second reason set forth in J-3 was, "Inappropriate professional attitude, e.g., taping of conversations without authorization." The petitioner began taping conferences because she was being subjected to blatant intimidation." However, her examples of blatant intimidation were:

> Statements such as I hired you, but use of hostile, and antagonistic, facial expressions, tone of voice and words like what are you going to do about it or you did this, you did that. That didn't occur any longer. He was far more reserved and perfunctory and [sic] his manner of speaking to me. I-36.

As the superintendent's recommendation concerning the supervisor's employment demonstrates, the supervisor was not the perfect administrator. However, as the school social worker indicated on the stand, her problems with the supervisor were resolved with a conference among herself, the supervisor and the assistant superintendent. She did not resort to the taping of meetings with the supervisor. It would seem that in the

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social worker's case, the system worked to her benefit and where the supervisor needed correction, he was corrected by the assistant superintendent. However, in the petitioner's case, she chose not to take advantage of the assistant superintendent's presence and decided to tape record the conferences. The fact that she felt the need to tape the conferences is a legitimate factor that may go into the Board's decision. It is certainly not a common occurrence.

The supervisor did not object to the taping of these conferences. As testified to by both the assistant superintendent and superintendent, the supervisor was instructed by them to stop the petitioner from taping conferences. If the supervisor had something to hide or wished to continue with the alleged intimidation, he could have at the outset denied the petitioner the right to have the tape machine running.

The Board had a right to consider this whole situation of taping without authorization. Even if the Board's decision were based on this reason alone, it was not being arbitrary or capricious.

The third reason given for the nonrenewal was supported by two documented examples. J-3 states, "Lack of cooperation with and continued challenge to the authority of, your supervisor, the Director of Pupil Personnel Services."

The petitioner argued that the reason was not supported by facts. Certainly, the petitioner disputes the facts. However, a review of the recommendation of the supervisor does set forth at least two instances in which the petitioner went over his head. These two instances are documented, and the documents are attached to and referred to in the supervisor's recommendation (J-1). Furthermore, these two instances were independently recalled by the assistant superintendent on the stand.

It must be remembered that the petitioner had other avenues of appeal, even if her supervisor were unresponsive. The supervisor makes reference to her not following the chain of command. That was his description of this employment difficulty. There is nothing magic about the words "chain of command," but they can be translated into lack of cooperation or challenge to authority. This is certainly a legitimate concern of a board in deciding whether to reemploy a teacher and, simultaneously, grant tenure.

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There are practical reasons why there is a supervisor and there is a chain of command. There has to be an organized way of dealing with administration of an organization and with problems that arise. If each individual employee sought various opinions from various branches of the government or from various associations, there would be, at the least, confusion.

The Board was not unreasonable in basing its decision not to reemploy the petitioner on this reason. Certainly, the petitioner responded to these circumstances in her rebuttals to the evaluations and observations. Once again, the Board having heard both sides of the question, it is difficult to see how it could have been arbitrary and capricious in dealing with the renewal question.

It is infrequently that the true color of an individual is disclosed in a hearing, but the petitioner, on her rebuttal, did show an indication of her behavior regarding the cooperation issue. In discussing exhibit R-2, the report that describes alleged contamination during an observation, the petitioner's counsel asked her:

> Question: Would you please tell us whether or not there is any rational nexus between your comments in the records in the overall effect on the lesson?
>
> Answer: Yes, there was and this was.
>
> Question: What is it?
>
> Answer: Let me interject this. Debbie Stein, who is the chairperson of the New Jersey School Psychologist Association Ethics Committee. I spoke to her in relationship to that report. I was going to present that report to the Ethics Committee. I have a letter that should be attached to that entire pack, she felt that since the supervisor was no longer our director, that this is not a matter which should come before the Ethics Committee. She told me it was improper -
>
> Question: Ms. Costa, listen to my question please.

During the petitioner's answer, her counsel interrupted. At that point, however, her testimony was an example of her sense of her mission which translated her opinions and how these opinions are supported by "higher" authorities. That particular testimony was a glimpse of the true attitude that the supervisor described as not following the chain of command. Certainly, this type of attitude is difficult to describe

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and even more difficult to document. It is nonetheless an important part of the employee - employer relationship. No matter how well the petitioner did perform her functions, there still must be a team approach, particularly in the area of pupil personnel services. Since the petitioner was an employee of the Board, she had to be responsive to those policies instituted by the Board and its administration. This is an important element of the working relationship. A difficult personality in the employment relationship will create problems. It is these problems that the Board sought to alleviate when it decided not to renew the petitioner's contract. There is nothing arbitrary or capricious or unreasonable about this type of decision. Rather, it promotes the mission and operation of a board of education.

The petitioner's attack on the supervisor's recommendation to prove that the Board was arbitrary or capricious is misplaced. The supervisor's recommendation was but one thing among many that the Board considered in reaching its decision not to renew the employment of the petitioner. The whole list of things the Board had before it is laid out above. The petitioner well knew that the supervisor was not going to be recommended for renewal. This, then, became a tactical way of attacking the Board's position in this matter. However, factually, the supervisor's recommendation is but one factor in the whole picture. The petitioner would have an inordinate amount of weight placed on the supervisor's recommendation because she believes that he, personally, is susceptible to attack. However, it is not at all clear that the Board solely recommended nonrenewal on the basis of the supervisor's statements. It cannot be denied that they were a part of the process but neither can it be denied that there were many factors in the consideration.

Any argument that the assistant superintendent conspired against the petitioner because he defended the supervisor to the Board is simply not credible. The assistant superintendent testified that he had done that on other occasions for other subordinates whom he believed in. In this case, the assistant superintendent believed in the supervisor and the superintendent did not. It is important to note that the assistant superintendent, regardless of his position with regard to the supervisor, still had a job to perform with regard to the petitioner. If the petitioner were a superior performer, then the assistant superintendent had the obligation to go to bat for her as well. And it must be borne in mind that the assistant superintendent's dealings with the petitioner spanned more time than those of the supervisor. His recommendation, therefore, was based on several years of experience, including personal contact with the petitioner.

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V.

DISCUSSION AND DETERMINATION

A long line of Commissioner of Education decisions holds that a Board's discretionary action is entitled to a presumption of validity. See, e.g., Baker v. Lenape Regional High School District Bd. of Ed., 1975 S.L.D. 471. In that matter, the Commissioner stated:

> N.J.S.A. 18A:27-1 et seq. provides the basis for a board of education entering into contractual relationships with teaching staff members and the conditions under which such teaching staff members may be terminated. Herein, there is no showing that the Board acted other than as provided by statute. The Board's notice of termination as given prior to the statutory deadline of April 30 as required by N.J.S.A. 18A:27-10. The Board was clothed with statutory authority to terminate petitioner's services. It remains only to determine whether this action was taken for proscribed reasons.
>
> The Commissioner has at various times reviewed such actions of local boards of education and in certain circumstances, finding that the protected rights of teaching personnel were violated, has set aside the actions of boards wherein they violated those protected rights of nontenured employees or otherwise abused their discretionary powers. [Citations omitted.]
>
> At other times the Commissioner has upheld the actions of boards of education when no abuse of discretion was found. Nicholas P. Karamessinis v. The Board of Education of the City of Wildwood, Cape May County, 1973 S.L.D. 351, affirmed State Board, 1973 S.L.D. 360, affirmed Dkt. No. A-1403-73, New Jersey Superior Court, Appellate Division, March 24, 1975.
>
> The discretionary powers of education boards are well recognized by both the Commissioner and the courts. The Commissioner has said in numerous instances that he will not substitute his discretion for that of a board absent a clear showing of bad faith, statutory violation, or violation of constitutional rights. It was said in South Plainfield Independent Voters et al. v. Board of Education of the Borough of South Plainfield, Middlesex County, 1975 S.L.D. 47:
>
> > "* * * In a deliberation of a local board of education, particularly with respect to disciplinary action against any employee, '* * * it is of the very essence that justice avoid even the appearance of injustice * * *.' James v. State of New Jersey, 56 N.J. Super. 213, 218 (App. Div. 1959); Hoek

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> v. Board of Education of Asbury Park, 75 N.J. Super. 182, 189 (App. Div. 1962) * * *" (at p. 56)

Additionally, it was said in John J. Kane v. Board of Education of the City of Hoboken, Hudson County, 1975 S.L.D. 12 that:

> "* * * The Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when is affirmatively shown that the action was arbitrary, capricious or unreasonable [citations omitted].* * *"
> (at p. 16)

Where the action of the Board of Education bears a direct and rational relationship to the information the Board has before it, a decision not to renew the employment of a nontenured employee will be upheld. Mauro v. Bridgewater-Raritan Reg'l School Dist. Bd. of Ed., OAL DKT. EDU 3150-82 (Mar. 15, 1983, adopted Comm'r of Ed. (Apr. 18, 1983)).

In Banzer v. Madison Bd. of Ed., OAL DKT. EDU 3089-80 (Apr. 17, 1980), adopted Comm'r of Ed. (June 5, 1980), the Commissioner upheld a finding that "the determination of the Board resulted from a conclusion that the three retained nontenured teachers had more strengths and/or fewer weaknesses than the petitioner." Id. at 537-538. In that matter, the petitioner alleged that the Board's termination of her services was improper, illegal and an abuse of its discretionary authority. However, the Board had decided for valid reasons to reduce its force by one teacher. There were four nontenured teaching staff members. The Board decided to non-renew Banzer. In addition to the finding, above, the decision states:

> The Commissioner stated in Nettles v. Board of Education of the City of Bridgeton, 1976 S.L.D. 555 that "boards of education are invested with broad discretionary powers, N.J.S.A. 18A:11-1. One of the most essential of these is the power to determine who shall be employed reemployed to teach in the public schools in each successive year." (at 560)

The Commissioner also stated in Nettles that:

> Absent a showing of abuse of the discretionary powers, the Board's determination is entitled to a presumption of correctness.

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> [citation omitted.] In such matters the Commissioner will not substitute his discretion for that of the local board. (at 560)
>
> It was further stated in Nettles that "It is true that a board may not act in ways which are arbitrary, unreasonable, capricious, or otherwise improper. Cullum v. North Bergen Board of Education, 15 N.J. 285 (1954)." (at 560)
>
> A careful and thorough review of the entire record in the instant matter reveals clearly that the petitioner has not met her burden of proof that the Board's action must be set aside due to impropriety, illegality, or abuse of its discretionary authority, or any other reason. . . .

So it is in the present case. The petitioner undoubtedly believes she has been unjustly non-renewed. The record, however, does not support her belief.

The petitioner seems to argue that because no Board members were produced at the time of hearing to elaborate on the nature of their deliberation and the superintendent conceded that the extent of his involvement was to review the recommendations of the supervisors, review the observations and evaluations and render a recommendation based on that review somehow colors the entire decision. This does not withstand scrutiny. First, the respondent was under no obligation to produce Board members. The petitioner, by contrast, bore the burden of persuasion. Second, the superintendent's testimony went farther than the petitioner apparently recalls. He stated that in addition to all the material he had before him, he did have some contacts with the petitioner outside of the observation process and, hence, some additional basis for the formation of an opinion.

The petitioner testified that she grieved an adequate rating on an evaluation up to and including the Board level. The Board did not change the evaluation after hearing the grievance. Yet, the petitioner claims she later had no notice concerning "adequacy." More importantly, some Board members who sat on that grievance hearing were involved later in the nonrenewal decision. It is black letter law that the Board has a right to consider all aspects of a teacher's performance in reaching a determination to reemploy or not.

The petitioner also complained that her supervisor never told her what someone else was doing that was "more than adequate." I can find no rule or case law

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decision that would require the supervisor to tell the petitioner what some other employee was doing. That appears to have been a decision based on management style. The supervisor could have, provided he preserved the anonymity of the other employee, suggested to the petitioner what another employee was doing or how another employee was performing that was different from and better than the petitioner's performance. Similarly, the petitioner's complaint about things not being put in writing may go to management style. On the other hand, if every contact between the supervisor and the petitioner were reduced to writing, the charge could well be harassment.

Having considered the whole record in this matter, including the arguments of counsel, and having observed the witnesses as they testified, I **FIND** that the petitioner has not carried the burden of persuasion in this matter. I further **FIND** that a preponderance of the evidence shows the Board had legitimate concerns about the performance of the petitioner. Faced with a decision that would or would not bestow tenure upon the petitioner, the Board exercised its discretion and decided not to enter into the virtually permanent tenure relationship in this case. I also **FIND** that the Board had before it information that was both sufficient and credible to support that decision.

In consideration of these findings, I **CONCLUDE** that the petitioner has not shown that the decision of the Long Branch Board of Education not to renew her employment for the 1985-86 school year was arbitrary, capricious or unreasonable. Therefore, it is **ORDERED** that the petition of appeal be and is hereby **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 MARCH 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE MAR 9 1 1986

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 26 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

bc/ee

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ROSEMARIE COSTA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF LONG BRANCH, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. It is observed that petitioner's exceptions to the initial decision and the Board's reply were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

It is noted from a review of petitioner's exceptions that the same arguments advanced before the ALJ and addressed in detail in the initial decision are relied upon in an effort to persuade the Commissioner that a reversal of the initial decision is warranted.

Petitioner argues that the standard used by the ALJ in reaching his findings and conclusions was unduly narrow while, at the same time, conceding that the scope of such review as it pertains to nontenured teachers is narrower than other cases requiring decisions to be rendered by the Commissioner. (Petitioner's Exceptions, at pp. 1, 6)

Petitioner reiterates her challenge to the reasons given to her by the Board for her nonreemployment. She argues that the reasons are vague, imprecise and predicated upon undocumented testimony which was grounded on situations taken out of proportion and inaccurately presented.

In support of these contentions, petitioner argues that the ALJ erred in failing to consider the following actions of the Board or its administrators arbitrary, capricious or unreasonable:

1. The Board had no policy which specifically indicated that in order to achieve tenure a nontenured employee would be required to exhibit superior performance in his or her position of employment. Moreover, the Board had produced no evidence to demonstrate how it arrived at such a determination.

2. The Board was unable to prove that petitioner taped any unauthorized conversations or conferences between her supervisor.

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3. The negative recommendation (J-1) made by petitioner's supervisor regarding her non-reemployment was not improperly relied upon inasmuch as the record establishes that he lacked experience and knowledge in evaluating child study team personnel. Additionally, petitioner points out that her supervisor's resignation from the Board's employ was due to the fact that the Board was dissatisfied with his performance.

4. The assistant superintendent's testimony reveals that his observations of petitioner's performance were informal. Moreover, his appraisal of her performance is considered unreliable inasmuch as he evidently supported the reemployment of her supervisor with whom the Board was dissatisfied.

5. Due to the lack of her supervisor's experience and knowledge of her duties as the Director of the Child Study Team, petitioner had no alternative but to question his directives by making inquiries on two occasions to other professional state organizations outside of the school district regarding the propriety of her supervisor's decisions.

The Commissioner upon review of petitioner's exceptions to the initial decision finds them to be misplaced and without merit. In this regard the Commissioner finds and determines that the record of this matter is sufficiently documented to establish that the Board's determination not to reemploy her was valid. It is apparent from the record that petitioner's level of performance was not deemed to be of a level acceptable to the Board for the purpose of reemploying her for a succeeding school year.

In the Commissioner's judgment not only did petitioner fail to carry her burden of proving that the Board's action was arbitrary, capricious or unreasonable, but rather her testimony reveals that she ignored following the proper administrative channels available to her in seeking to remedy what she perceived as being inadequate directives and guidance from her supervisor. In certain respects petitioner not only displayed a lack of confidence in her own supervisor, but also the assistant superintendent, as well as the superintendent. This conclusion is grounded upon her failure to consult with these administrators when she disagreed with her supervisor. Instead, petitioner took it upon herself to challenge the directives of her supervisor by seeking professional guidance and advice from State agencies outside the accepted "chain of command."

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It cannot be ignored that petitioner's actions created an atmosphere of contention and concern which adversely affected the day-to-day operation of the school district. Petitioner relies upon the absence of any Board policy setting forth the standards by which superior performance is to be evaluated. She seeks to persuade the Commissioner that the impropriety of her actions in failing to exhaust local administrative procedures involving her disagreements with her supervisor as well as the tape recording of her conferences with her supervisor, are matters which may not be used by the Board as being relted to her performance giving rise to the reasons for her nonreemployment. The Commissioner does not agree. The record of this matter leads the Commissioner to further conclude that petitioner by virtue of her conduct, improperly and erroneously placed herself in a position where she evaluated her superiors rather than participated constructively in their evaluation of her performance.

For the reasons stated above, the Commissioner hereby affirms those findings and conclusions in the initial decision and specifically adopts as his own the pertinent language of the ALJ in the initial decision which relies on Donaldson, supra, and Dore, supra, to conclude:

> ***The employer must review the totality of its experience with the employee.*** [The Board] could no longer wait for her expected development and decided it would be best if she were not employed with the district because she was not performing at the desired level. Someone has to make a decision on employment. In a school district, the board of education is given that authority. By their very nature, these decisions are both subjective and discretionary.***
>
> (Initial Decision, ante)

Accordingly, the Commissioner finds and determines that the record of this matter does not support petitioner's claim to the relief which she is seeking. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5733-85
AGENCY DKT. NO. 288-8/85

ROSE LINFANTE,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL AND TECHNICAL SCHOOLS, ESSEX COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld, Cohen & Blunda, attorneys)

Nathanya G. Simon, Esq., for respondent (Schwartz, Pisano & Simon, attorneys)

Record Closed: February 26, 1986 Decided: March 17, 1986

BEFORE **ARNOLD SAMUELS**, ALJ:

This matter involves an appeal by the petitioner from the action of the Board of Education of the Essex County Vocational Schools (Board) transferring her from the position of Instructor of Related Beauty Culture at the North 13th Street Center (daytime) to the position of Instructor of Beauty Culture (evening) at the Technical Career Center for the 1985-86 school year. Ms. Linfante filed a petition of appeal with the Commissioner of Education on August 21, 1985, alleging that the transfer violated her tenure and seniority rights, and that it was an arbitrary, capricious and unreasonable action. The petitioner demanded that the Board be directed to reinstate her to a day school position commensurate with her seniority, and that she be awarded damages.

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The respondent filed an answer on September 10, 1985, denying the substantive allegations of the petition and asserting various affirmative defenses. The matter was transmitted to the Office of Administrative Law on September 11, 1985 for hearing and determination as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held at the Office of Administrative Law on November 4, 1985, and a Prehearing Order was entered, defining and limiting the issues to be decided, fixing hearing dates, providing for discovery and regulating other procedural aspects of the forthcoming hearing. The issues were stated as follows:

A. Were the petitioner's tenure and seniority rights violated by the transfer? (The transfer resulted from a reduction in force of a third party.)

B. Is the petitioner's new position tenure-eligible, even though students in the program may not receive diplomas?

C. Was the petitioner's transfer arbitrary, capricious or unreasonable?

A hearing was held at the Office of Administrative Law in Newark, New Jersey, on January 17, 1986. The petitioner testified in her own behalf, and the Superintendent of Schools testified for the respondent Board. Five exhibits were marked in evidence, by stipulation. A list of the exhibits is attached to this decision. Posthearing briefs were filed by the parties, and the record closed on February 26, 1986, the date on which the last memorandum was received from counsel.

Most of the basic facts were uncontested, and a Stipulation of Facts (Exhibit J-1) was entered into between the parties, and it is herein found to be **FACT**, as follows:

1. Rose Linfante is a tenure teaching staff member in the area of beauty culture employed by the respondent school district, with employment record showing that she was appointed as an instructor on a half-time basis effective September 1, 1966 and as a full-time instructor effective September 1, 1968.

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2. Rose Linfante holds a regular instructional certificate with the endorsement-teacher of Production, Personal or Service occupations (beauty culture) issued in June, 1973.

3. The respondent school district is the Vocational Technical School for Essex County and it is composed of six centers:

Technical Career Center, Day Division, (Sussex Ave. Center);
Technical Career Center, Evening Division;
Bloomfield Center, Day Division;
Irvington Center, Day Division;
West Caldwell Center, Day Division;
North 13th Street Center, Day Division.

4. The program at the Technical Career Center, Evening Division, is a full-time adult school program. The teachers employed within this program must be appropriately certificated, are part of the Essex County Vocational Technical Teachers Association, and have all the same rights and benefits of the negotiated agreement between the respondent district and the Teachers Association, including a provision for additional compensation for working in the Evening Division. Throughout the history of the school district, teachers have been transferred among the six facilities which compose the district.

5. Petitioner has been transferred within her area of certification-beauty culture. Her tenure and seniority rights continue in her area of certification.

6. Prior to school year 1985-86, Rose Linfante taught at the North 13th Street Center, Day Divison.

7. By correspondence dated May 16, 1985, Superintendent William

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Harvey, Ed. D., notified Rose Linfante that he will be recommending to the Essex County Vocational School's Board of Education at its May 28, 1985 meeting that she be transferred from the position of Instructor of Beauty Culture at the North 13th Street Center to the position of Instructor of Beauty Culture at the Technical Career Center, Evening Division, for the 1985-86 school year. Additionally, the reason for the transfer was set forth and stated as follows:

"My reason for doing this is to improve the programming in the Essex County Vocational-Technical School System."

8. The respondent Board of Education approved the recommendation of the Superintendent at the May 28, 1985 meeting and transferred Rose Linfante from the North 13th Street Center to the Technical Career Center, Evening Division, for the 1985-86 school year. Her teaching assignment as instructor of beauty culture remained the same.

9. On or about August 19, 1985, a petition of appeal was filed with the Commissioner of Education by Rose Linfante. On or about September 6, 1985, an Answer was duly filed.

10. A prehearing conference was held on the matter at the Office of Administrative Law before Arnold Samuels, Administrative Law Judge, on November 4, 1985. On November 6, 1985, a Prehearing Order was issued.

The petitioner, Rose Linfante, testified as follows: She is certified as a Teacher of Production, Personal or Service Occupations—Beauty Culture, which she has been teaching for 20 consecutive years, at the North 13th Street School. The subject is generally split into two courses. Beauty culture related theory is the textbook aspect of the subject, dealing with anatomy and other theoretical aspects. The shop course is the practical, hands-on application of the subject. Ms. Linfante never taught the shop course,

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but the same certification is required and used for both. When she was transferred out of the 13th Street School, where she only taught beauty culture related theory, her new assignment at the Career Center included the teaching of shop combined with beauty culture related theory. The petitioner remarked that 20 years earlier she had been denied permission to take a shop training course. Part of the shop course training deals with the different chemicals needed to work with black peoples' hair. She is learning that now, on the job.

In addition to the geographical transfer, Ms. Linfante is also aggrieved by the fact that the shop and beauty culture related theory course that she now teaches at the Career Center is an evening position, whereas the beauty culture related theory course that she taught for 20 years at the North 13th Street School was always a daytime class. She also commented that some teachers with less seniority than her were not transferred from one school to the other. She feels that the primary cause for the entire situation was the layoff of an untenured teacher who taught the same subject at the North 13th Street School.

The petitioner agreed, however, that her position at the North 13th Street School was actually abolished, and that even if she remained at that location she would be teaching a combined shop and beauty culture related theory course. She also acknowledged that she is being paid an additional $1,000 a year because she is teaching in the evening, pursuant to a negotiated agreement. In addition, the adult students in the evening school are working towards a State license in beauty culture, not necessarily a high school diploma. The students in the day program, while also becoming eligible to receive a State license, were also working towards high school completion. Both programs are full-time.

Dr. William Harvey, Superintendent of the Essex County Vocational Schools, testified for the respondent. He indicated that school principals as well as teaching staff members are often rotated from one facility to another, from night session to day session, and vice versa. This rotation also periodically includes beauty culture teachers. Mr.

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Harvey stated that an overall reorganization was put into effect for the 1985-86 school year. One school, the Technical Career Center, Day Division, on Sussex Avenue, was closed entirely, and daytime adult courses were moved to the evening. Part of the reorganization involved teaching staff changes at the North 13th Street Center. One teacher was moved to West Caldwell, two were moved to the Technical Career Center, Evening Division, and one was terminated. Three teachers remained at the school (including two who teach shop). Dr. Harvey testified that, in part, the reorganization took place because day students at North 13th Street were being given more hours than were necessary. Only 1,000 hours of instruction are needed for the examination, and these students were receiving 1,400 hours. He felt that maintaining a beauty culture related course by itself was inefficient, and that the instruction should be combined, in all cases, with the shop course.

A decision was made to transfer the petitioner because it would create a minimum amount of disruption of the entire program. One opening had been created in the evening program at the Technical Career Center. Ms. Linfante qualified for it, and the administration felt that there was not another slot which was more appropriate under the circumstances. Their choice was to transfer her or lay her off. Dr. Harvey understands that other teachers with less seniority than the petitioner remained at the North 13th Street School. Nevertheless, it was felt that greater efficiency would result if Ms. Linfante were tranferred into the open position at the Technical Career Center. He also emphasized that, wherever she would be teaching in her position, the petitioner would instruct a combined beauty culture related theory and shop course.

In addition to the stipulated facts set forth above, the following is also found to be **FACT:**

1. Beauty culture related theory and shop are two separate aspects of the teaching of beauty culture, but both are encompassed within the same certification requirement. It is comparable to a teacher who holds a subject field endorsement in English being certified to teach either literature or composition.

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2. Because the reorganization referred to above eliminated all courses where beauty culture related theory was taught alone and created combination courses that included shop, the petitioner would nevertheless be teaching such a combined theory and shop course even if she remained at the North 13th Street School.

3. Considering the above fact, the petitioner is then, in effect, challenging the geographical transfer from one school to another and the time transfer from day school to evening school, rather than a subject matter transfer.

The petitioner's first contention is that the position into which she was transferred without her consent is not a tenurable position, hence violating her tenure rights pursuant to N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-6.

In Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982), the Supreme Court held that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked for the requisite number of years are eligible for tenure unless they come within certain explicit statutory exceptions. Those teaching in adult vocational programs are also included within the purview of the three requirements stated above. Rabolli v. Board of Education of Bergen County Vocational Technical Schools, 1983 S.L.D. ____.

The petitioner's employment in the location to which she was transferred satisfies all of these requirements. The course she teaches is fully encompassed within her certification. The adult educational program is full-time and the fact that some of the students may not be in a high school diploma track is irrelevant. Any teacher holding a valid certificate who works for the requisite number of statutory years in such a position would attain tenure, and the petitioner is teaching in such a position. Her arguments that attempt to resurrect old barriers that existed in the case law before Spiewak (such as Perth Amboy Federation of Teachers v. Board of Education, 1981 S.L.D. ____; Capella v. Camden County Voc.-Tech. School Board of Ed., 145 N.J. Super. 206 (App.

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Div. 1976)) are contradicted by the clear unequivocal and unconditional language of Spiewak.

The question of whether or not the petitioner's seniority rights were violated by the transfer is somewhat more complex. Seniority is a concept which only applies to certain rights of tenured personnel and it only has meaning when a reduction in force takes place. Howley v. Ewing Board of Education, 6 N.J.A.R. 509, 521 (1982). See also, N.J.S.A. 18A:28-9, 10 and 13. The petitioner's claim in contesting her transfer is grounded upon her opinion that she was involved in a reduction in force, because of the termination of the one nontenured teacher. That is not entirely accurate. The petitioner was primarily transferred as the result of a reorganization.

> Local boards of education are empowered to transfer tenured teaching staff members from one position to another subject only to the limitation of the statute N.J.S.A. 18A:25-1. Marjorie S. Payne v. Board of Education of the Village of Ridgewood, 1976 S.L.D. 605, 609.

In David L. Moore v. Board of Education of the City of Newark and James Barrett, Jr., 1979 S.L.D. 176, the Commissioner of Education stated:

> A reassignment from one schoolhouse to another while the teaching staff member is engaged teaching the same subject within the scope of his certificate is a transfer within the meaning of the statute.

N.J.S.A. 18A:28-10, upon which petitioner also relies, deals with dismissals that result from reductions in force which, according to the statute, shall be made on the basis of seniority. We are not dealing here with a dismissal of the petitioner. A transfer of a teaching staff member within the endorsement on his or her certification is a matter of inherent managerial responsibility and is not the same as a dismissal resulting from a reduction in force. N.J.S.A. 18A:28-6. Ridgefield Park Education Ass'n. v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978).

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The petitioner also relies upon decisions of the Commissioner of Education that have placed restrictions on transfers without consent of the teacher when the transfer has been to a position other than a tenure-eligible position, (Jeanette A. Williams v. Board of Education of Plainfield, 1979 S.L.D. 220) and where an involuntary transfer has been made to a new position, while retaining others with less seniority (Nicholas F. Cucolo v. Board of Education of the Essex County Vocational School District, 1985 S.L.D. ____).

It has been previously determined that the petitioner was transferred to a tenure-eligible position, and therefore the Commissioner's holding in Williams is not applicable to the facts in this case.

In Cucolo, a tenured high school English teacher was transferred to a new position of "In-school Suspension," while English teachers with less seniority were retained. The Commissioner held that the involuntary transfer to a new position did violate the petitioner's seniority rights under N.J.A.C. 6:3-1.10(i), and that the transfer should have been determined on the basis of seniority. Furthermore, the Board failed to conform to the requirements of N.J.A.C. 6:11-3.6(b) by not submitting a job description for the new position to the County Superintendent for prior approval and determination of the appropriate certificate (referring to the in-school suspension position). The decision was based on the fact that two different positions were seemingly involved.

The petitioner acknowledges that a transfer of a tenured teacher to another assignment can be made without the consent of the teacher if it is in the "same position." Kenneth Miscia v. Board of Ed. of East Hanover, 1983 S.L.D. ____. However, petitioner insists that her transfer to the evening beauty culture program was a transfer to a different position that required her consent. That is a fact question, and it has been found as a fact that the positions are the same. "Related" and "Shop" are only different facets of the same certification and position.

To further support her insistence that the Board was compelled to adhere to seniority regulations when she was transferred, the petitioner refers to Popovich v. Board of Education of Wharton, 1975 S.L.D. 737. There a teacher was reduced from full-time

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duties, five days a week, to a part-time assignment for only three days a week. That was considered to be a reduction of force in her category, and the Commissioner held that so long as the Board maintained a full-time position, the petitioner had seniority and was entitled to occupy that position. Again, petitioner elects to treat her transfer from one full-time position to another, within the same endorsement on her certification, as a reduction in force. That is also a fact question. It has been found that petitioner was transferred, not reduced in her employment.

The petitioner's reliance on all of the above situations is misplaced. She has been transferred within the scope of her certification, whereas all of the above problems arose when the transfer was presumably made beyond the certification. For example, in Cucolo the transfer was from teaching English to duties known as "In-school Suspension" (where the teacher was required to act as a nonteaching monitor for students who were assembled in a single unit to serve disciplinary suspensions and complete work assigned by their regular teachers).

Based upon all of the foregoing, it is **CONCLUDED** that:

A. The petitioner was transferred from one tenure-eligible position to the same tenure-eligible position within the same certification. Under such circumstances, the petitioner is not justified in insisting that her consent is required, or that she may exercise seniority in order to control the physical location of her assignment or the time of day that it is taught. She was, and still is, engaged in teaching the same subject within the scope of her certificate. It is undisputed that even if the Board had permitted petitioner to remain at the North 13th Street School, the position in which she taught only beauty culture related theory would have been abolished, and she would now be teaching shop also.

B. The Board was justified in effecting the petitioner's transfer without her consent and without considering seniority rights.

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C. There was no reduction in force that directly affected the petitioner's rights or reduced her in her position. Even if the one nontenured teacher had been retained as part of the reorganization, the Board would still not have violated the petitioner's tenure or seniority rights by transferring her as it did.

D. The respondent has demonstrated valid and reasonable organizational and managerial reasons for the reorganization that preceded the petitioner's transfer; and the petitioner has not proved, by a preponderance of the credible evidence, that the Board's action affecting the petitioner was arbitrary, capricious, unreasonable, contrary to the authority of the Board or prohibited by any agreement.

Therefore, for all of the foregoing reasons, it is **ORDERED** that the petition be **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** , who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

March 17, 1986
DATE

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

MAR 20 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 20 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

ms/e

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APPENDIX

List of Exhibits

J-1	Stipulation of Facts
J-2	Letter, William Harvey to Rose Linfante, May 16, 1985
J-3	Letter, William Harvey to Rose Linfante, May 29, 1985
J-4	Certificate, Rose Linfante, June 1973
J-5	Letter, Rose Linfante to George Morgenroth, June 23, 1967

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ROSE LINFANTE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY VOCATIONAL SCHOOLS, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions mirror those arguments made in her post-hearing brief, which are incorporated herein by reference. Petitioner reiterates her two arguments that:

1. Petitioner's transfer to the night school occurred as a result of a reduction in force in that a nontenured teacher in the same program was laid off. Therefore, any transfer must take seniority rules into account, which the Board failed to consider in transferring petitioner to her current position.

2. The students in the evening adult school are working toward a State license in beauty culture, while the students whom petitioner taught in the day program are working toward the acquisition of a high school degree. Therefore, petitioner's transfer into the evening, nontenurable position was carried out in violation of her tenure and seniority rights.

The Board's reply exceptions fully support all the findings and conclusions contained in the initial decision. The Board reiterates the arguments it raised in its post-hearing brief that:

1. Petitioner's transfer from one geographical location to another was a reassignment within the same subject area which neither requires the consent of the individual affected nor consideration of seniority factors.

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2. While it cannot be disputed that when there is a reduction in force, seniority must be considered, this case does not involve a reduction in force but rather a transfer from one geographical location to another. The transfer is neither a dismissal nor a demotion. The position at the Evening Division of the Vocational School System is the same and the criteria for employment clearly make it tenure-eligible.

3. Regardless of whether a nontenured individual was nonrenewed or retained, the transfer ability of the school district is not to be circumscribed.

Having reviewed the record in this matter, the Commissioner adopts the recommended report and decision of the Office of Administrative Law for the reasons expressed therein. It is noted that although a reduction in force may indeed have occurred as a result of the reorganization of the vocational school for Essex County, petitioner herself was not riffed. Thus, her position as a tenured teaching staff member was never placed in jeopardy, and it was, therefore, entirely within the Board's discretion to reassign her to another geographic location within her certificate endorsement. Since her endorsement as a Teacher of Production, Personal or Service Occupations includes both beauty culture related theory and the shop course on practical application of the subject, and since the position wherein she had taught only beauty culture related theory was effectively abolished by the reorganization, she suffered no blow to her tenured status or her seniority entitlements on having been reassigned to the Evening Division position. See Kenneth Miscia v. Board of Ed. of East Hanover, Morris County, decided by the Commissioner March 31, 1983. See also N.J.S.A. 18A:28-6.

As to petitioner's contention that the position at the evening school, into which she was reassigned, is not a "tenurable" position because those students work toward State licenses in beauty culture not toward their high school degrees, the Commissioner finds, as did the ALJ, that Spiewak v. Rutherford Board of Ed., 90 N.J. 63 (1982) is the polestar in determining under what circumstances tenure and, thereby, seniority rights attach to a teaching position. As the ALJ in the instant matter stated:

> In Spiewak v. Board of Education of Rutherford, 90 N.J. 63 (1982), the Supreme Court held that all teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have worked for the requisite number of years are eligible for tenure unless they come within certain explicit statutory exceptions. Those teaching in adult

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vocational programs are also included within the purview of the three requirements stated above. Rabolli v. Board of Education of Bergen County Vocational Technical Schools [decided by the Commissioner March 18, 1983].

The petitioner's employment in the location to which she was transferred satisfies all of these requirements. The course she teaches is fully encompassed within her certification. The adult educational program is full-time and the fact that some of the students may not be in a high school diploma track is irrelevant. Any teacher holding a valid certificate who works for the requisite number of statutory years in such a position would attain tenure, and the petitioner is teaching in such a position. Her arguments that attempt to resurrect old barriers that existed in the case law before Spiewak (such as Perth Amboy Federation of Teachers v. Board of Education [decided by the Commissioner December 24, 1981]; Capella v. Camden County Voc.-Tech. School Board of Ed., 145 N.J. Super. 206 (App. Div. 1976)) are contradicted by the clear unequivocal and unconditional language of Spiewak. (Initial Decision, ante)

Accordingly, for the reasons stated herein as well as those enunciated by the ALJ, the Commissioner adopts the findings and determinations contained in the initial decision. The instant Petition of Appeal is accordingly dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 5, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7846-85
AGENCY DKT. NO. 375-10/85

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
NELLY FIGUEROA,
Respondent.

Robert B. Rottkamp, Jr., Esq., for petitioner (Rottkamp & Flacks, attorneys)

Nelly Figueroa, respondent, pro se

Record Closed: February 4, 1986 Decided: March 17, 1986

BEFORE **BRUCE R. CAMPBELL**, ALJ:

The Trenton Board of Education (Board) charges Nelly Figueroa (respondent) with incapacity, unbecoming conduct and other just cause, specifically, chronic and excessive absenteeism, absence without approval and abuse of sick leave.

On October 22, 1985, the Trenton Board of Education determined to certify these charges against Nelly Figueroa. On October 25, the Board forwarded to the Commissioner of Education a statement of charges and statement of evidence, under oath, with supporting documentation, a certification of the Board secretary and a copy of a letter of September 25, 1985, to Ms. Figueroa. It appears that proof of service was inadvertently omitted from the Board's submission. On October 29, a representative of the Bureau of Controversies and Disputes contacted the Board's assistant secretary and requested proof of service. Under cover of the same date, the assistant secretary submitted a jurat setting forth that he had delivered a copy of the certification of the

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Board secretary and other pertinent data on Friday, October 25, 1985, by certified mail to the last known address of Ms. Figueroa.

A photocopy of a receipt for certified mail signed by Nelly Figueroa on September 30, 1985, at 3180 South West 19th Street, Miami, Florida, is appended to one of the copies of the materials submitted to the Commissioner. On December 5, 1985, the Board attorney wrote to the Bureau stating:

> Enclosed please find September 25, 1985 correspondence from the Trenton Board of Education to the respondent, Nellie Figueroa. The letter which forwarded the charges and statement of evidence among other things is self explanatory. Also, enclosed please find photostatic copy of the green card (Domestic Return Receipt) which indicates that Nellie Figueroa received the charges and evidence on September 30, 1985 as evidenced by her signature.

Attached to the attorney's letter is a copy of the September 25 letter from the Board's secretary to Ms. Figueroa and a copy of the Domestic Return Receipt described above. On December 11, 1985, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was noticed for January 9, 1986. At that time, the Board attorney appeared but the respondent did not. I filed an abandoned case form with the Clerk of the Office of Administrative Law. I supplied the Clerk with Ms. Figueroa's last known Trenton address and the Miami address that appeared on the Domestic Return Receipt.

The Clerk wrote to Ms. Figueroa at both addresses under date of January 17, 1986, informing her that she had failed to appear for the scheduled prehearing without prior notice. He further advised her that the request for a hearing would be considered abandoned unless she were to supply, in writing, within 10 days, either verification of the fact that she was ill on the day of the scheduled prehearing or was unable to appear due to an unforeseen emergency. On January 29, the Office received a response from Carlos A. Enriquez, an attorney-at-law in Florida, on behalf of Ms. Figueroa. The letter stated, among other things, that Ms. Figueroa had written to the Administrative Law Judge on January 3 explaining that she could not afford to attend the prehearing or the hearing. In the letter she asked the ALJ to examine all the evidence in the file and the correspondence she had sent and then make a ruling. A copy of Ms. Figueroa's letter of January 3 is attached to the attorney's letter.

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Ms. Figueroa's letter asks that the letter be accepted as her appearance. It further requests the ALJ to "read all the correspondence that was sent to your attention and accompanying documents and statement of facts." Further, Ms. Figueroa states that she has not been able to retain an attorney from a legal services or legal aid group or through her teachers union.

I.

A respondent need not be present at a hearing on tenure charges. Tenure of Frazier, 1980 S.L.D. 234. There are no statutes, regulations or case law that require the appearance of the respondent at a tenure hearing. An administrative law judge may compel the appearance of a party at his discretion through the issuance of an order or a subpoena. There are no established rules requiring the presence of a defendant at a civil trial. Although a defendant must be present at a criminal trial, this requirement flows from a criminal defendant's rights under the fifth and sixth Amendments of the United States Constitution and Article I, par. 10, of the New Jersey Constitution, rights not accorded a defendant in civil litigation. In fact, a criminal defendant may voluntarily absent himself after trial has commenced. R. 3:16. See also, State v. Smith, 29 N.J. 561, 578 (1959).

Hearings on the papers are authorized in many administrative contexts. See, e.g., N.J.A.C. 1:2-3.1 et seq. (motor vehicle cases) and N.J.A.C. 1:1-13.1 et seq. (summary decision).

II.

The statement of charges sets forth, among other things, that the respondent was and had been a bilinqual teacher under tenure employed by the Board of Education since March 18, 1980; during the 1982-83 school year, she was absent from her duties a total of 16 days, 10 for personal illness, three for illness in family and three personal days; during the 1983-84 school year, she was absent 23 days, nine personal illness days, two illness in family days, two personal business days, and 10 accident days; during the 1984-85 school year, she was absent a total of 19 days in the period September 1, 1984-February 22, 1985, five personal days, three illness in family days, three personal business days and eight unauthorized days. From February 23, 1985 - June 20, 1985, the end of the school year, the respondent did not appear for work at all.

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The respondent goes on to state, "They never responded to the contrary and I relied on returning back to teaching in September 1985, when classes resumed. I never received the letter dated March 22, 1985 from [the principal] attached to the Statement of Evidence."

The respondent claims she wrote to Dr. Page on August 9, 1985, reaffirming her intent to return to teaching. "On August 23, 1985, I was suddenly surprised with a Mailgram from Mr. Clifford Zdanowickz advising me that there was no position for me anywhere in the Trenton School District. This statement that there was no position for me in the Trenton School District was a total falsehood" (R-1).

The respondent also states that she and her attorney had a series of telephone communications with various representatives of the Board. Public employees have a constitutionally protected property right in their employment. As a public school teacher, the petitioner is protected from dismissal without cause. The administration at Grant School, together with Dr. Page and the superintendent, are acting arbitrarily and are discharging the petitioner based on false allegations and without justifiable cause. The respondent also suggests that she is being discriminated against on the basis of age.

The petitioner requests that she be reinstated with back pay.

III.

Excessive absenteeism or abuse and improper utilization of sick leave may result in a charge of unbecoming conduct. In Tenure of Powell, OAL DKT. EDU 5584-82 (Sep. 29, 1982), adopted, Comm'r of Ed. (Nov. 9, 1982), the Board certified tenure charges against Powell for unbecoming conduct and incapacity based, in part, on excessive absenteeism. The Commissioner ordered the respondent dismissed from his tenured teaching position as of the date of the certification of charges. In Tenure of DeRose, OAL DKT. EDU 9610-82 (Apr. 14, 1983), adopted, Comm'r of Ed. (June 1, 1983), DeRose was charged with three counts of incapacity, conduct unbecoming a teaching staff member and other just cause. The counts involved excessive absences, failure to report for medical examination and failure to keep an accurate record book. The respondent voluntarily resigned before the administrative hearing and did not pursue a defense in the matter.

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Although neither the Administrative Law Judge or the Commissioner in the above cases reached a conclusion on the charges of excessive absenteeism as constituting unbecoming conduct, the cases suggest that a board of education may use its discretion, based on Board policy, to decide whether to bring the charge of unbecoming conduct for excessive absenteeism. Clearly, the Commissioner's policy is not to let cases of excessive absenteeism go unpunished.

Reading the documentation carefully, as the respondent requests, I can find no support for her position that the Board is discharging her arbitrarily and without justifiable cause. Nor can I find any support for an allegation of discrimination on the basis of age. Even making all inferences that fairly may be made in favor of the respondent, I **FIND** that the record in this matter shows chronic and excessive absenteeism, absence without approval and abuse of sick leave on the part of Nelly Figueroa.

I further **FIND** a board's interest in maintaining the continuity of the educational services provided to children is a substantial interest. Consequently, erratic attendance and frequent absence works a disruptive effect on the educational processes of a school.

I also **FIND** that any property interest argument raised by the respondent has been addressed by the provision to her of due process appropriate to the situation. Nicoletta v. No. Jersey District Water Supply Commission, 77 N.J. 145 (1978).

In consideration of the foregoing, I **CONCLUDE** that the Trenton Board of Education has proven its charges against Nelly Figueroa by a preponderance of the credible evidence in the record. Accordingly, it is **ORDERED** that Nelly Figueroa be dismissed from her position effective February 23, 1985, it appearing that February 22, 1985 was the last day upon which she either appeared for service or had adequate and sufficient excuse for absence.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

17 MARCH 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

MAR 19 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 20 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

ks/e

IN THE MATTER OF THE TENURE :

HEARING OF NELLY FIGUEROA, : COMMISSIONER OF EDUCATION

SCHOOL DISTRICT OF THE CITY : DECISION

OF TRENTON, MERCER COUNTY. :

:

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The record and initial decision rendered by the Office of Administrative Law have been reviewed. No timely exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner concurs with and adopts as his own the recommendation of the Office of Administrative Law.

Accordingly, respondent is dismissed from her tenured position as of the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 5, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1314-85
AGENCY DKT. NO. 469-11/84

ARLENE REBOVICH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for the petitioner (Klausner & Hunter, attorneys)

R. Joseph Perenczi, Esq., for the respondent

Record Closed: March 3, 1986 Decided: March 21, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner, a teacher with a tenured status, appeals from the determination of the Board of Education of the Township of Edison (Board) which abolished her position and later reinstated her to a half-time position. In the interim, the Board hired a full-time nontenured mathematics teacher to a position to which petitioner claims entitlement.

This matter was filed in the Office of the Commissioner of Education on November 20, 1984. On March 8, 1985, it was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Assigned initially to another administrative law judge, the prehearing conference scheduled for April 25, 1985, was adjourned at the Board's request. The matter was then transferred to me and a prehearing conference was held on April 14, 1985, in the Office of Administrative Law, Mercerville. This matter was consolidated with Yesalavich v. Bd. of Ed. of the Tp. of

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Edison, OAL DKT. EDU 1313-85, since it involved teachers in the same school district. Separate decisions are necessary, however, because the issues in each case are different. The parties agreed that there was no factual dispute and that the issue would be presented on cross motions for Summary Decision after the filing of letter briefs and pertinent documents.

For personal reasons, Board counsel was granted an extension to August 19, 1985, to file his letter brief. The record was not complete at that time and supplements to the record were demanded by telephone.

On October 31, 1985, the parties were required to submit additional information. When no response was received the parties were notified again by letter dated December 31, 1985, again requesting supplemental information. A response was prepared on January 9, 1986, but not received in the Office of Administrative Law until January 29, 1986. (I was on sick leave from January 6 to February 3, 1986.) Petitioner's response to the Board's letter was also received on January 29, 1986. Counsel replied in writing, received on March 3, 1986, to my telephone request for an explanation to the Board's letter received on January 29, 1986. On March 3, 1986, the record was closed.

ISSUES

1. Does petitioner have seniority as a mathematics teacher in grades seven and eight?

2. Are petitioner's tenure rights violated if the Board hires a nontenured person to teach mathematics and RIFs a tenured K-8 teacher who is qualified to teach mathematics in the 7th and 8th grades?[1]

DEFINITIONS

Supplemental teacher - one who provides remedial help or extra help in a specific subject to one pupil at a time, or to small groups of pupils, often outside the regular classroom.

---

[1] RIF means Reduction in Force.

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Departmentalized instruction - usually refers to the teaching of a single subject by each teacher. Pupils and/or teachers change classes as required so that each discipline in a pupil's course selection is satisfied.

UNDISPUTED FACTS

1. Petitioner enjoys a tenured status and holds an elementary teacher's certificate, grades K-8.

2. Petitioner was employed as a supplemental teacher on an hourly basis for the school years 1975-76, 1976-77, and 1977-78.

3. In the school year 1977-78, petitioner performed supplemental mathematics duties, grades 7 and 8, in one of the district's junior high schools.

4. In the school year 1983-84, petitioner taught departmentalized mathematics, grades seven and eight, in one of the district's middle schools.

5. For both of the above assignments (Nos. 3 & 4), petitioner taught the common branch subject (mathematics) authorized by her K-8 elementary certificate.

6. Petitioner's entire employment in the district was as a teacher holding elementary certification. She has no secondary certification.

7. On April 15, 1984, for reasons of economy or a reduction of the number of its pupils, the Board by resolution abolished respondent's eight-tenths (.8) position.

8. Petitioner had been RIFfed previously in 1982, 1983, 1984, and 1985.

9. On August 13, 1984, the Board reached a determination to reorganize instruction in the district commencing with the the 1984-85 school year as follows:

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A. Grades K-5(elementary school)

B. Grades 6-8 (middle school having departmentalized instruction)

C. Grades 9-12 (senior high school)

10. On August 13, 1984, the Board adopted a resolution which determined that the "middle school" containing grades 6-8 and having departmentalized instruction shall be designated "secondary" as defined in N.J.A.C. 6:3-1.10(l)15.

11. On August 20, 1984, a full-time mathematics position became available in one of the Board's intermediate schools.

12. Although petitioner held tenure, the Board hired a new employee to teach mathematics in its secondary school, effective September 1, 1984.

13. Effective September 13, 1984, the Board hired petitioner in a half-time position.

14. Petitioner's regular employment commenced in the 1978-79 year as a half-time elementary school teacher.

15. Her employment remained the same for the 1979-80 through 1982-83 school years.

DISCUSSION

All of petitioner's employment with the Board has been as a part-time teacher in the elementary teachers' category. In the 1983-84 school year, petitioner taught the common branch subject, mathematics, under that elementary certification, in a secondary school. Petitioner also taught supplemental mathematics in one of the district's junior high schools in the 1977-78 school year.

Petitioner asserts that she acquired seniority for her employment that year as an eight-tenths (.8) mathematics teacher; consequently, the Board's employment of a new teacher to teach mathematics is in violation of her tenure and seniority rights.

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The Board argues that it had the discretion to employ petitioner to teach mathematics in its secondary school; however, it is under no obligation to do so and petitioner cannot demand entitlement for a secondary teaching position without holding certification in the secondary category.

CONCLUSIONS OF LAW

Because a teacher is authorized and assigned to teach common branch subjects at the secondary level while holding an elementary teacher's certificate, such an assignment does not change the teacher's category from elementary to secondary (N.J.A.C. 6:3-1.10(l)15., 16.iv.).

In accordance with the State Board of Education rules N.J.A.C. 6:3-1.10(c), effective September 1, 1983, and pursuant to the statutory authority to adopt such rules (N.J.S.A. 18A:28-9 et seq.), a teacher's seniority may be established when there is a RIF. Petitioner was a tenured teacher in the elementary category when she was RIFfed in April 1984, irrespective of the fact that she taught .8 time in a grade 6-8 secondary school. All of the time she has accrued as a grade school teacher and as a teacher of departmentalized subjects in the secondary school may be "tacked on" to her elementary service. In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Tp. Bd. of Ed. and the Edison Tp. Bd. of Ed., decided by the Comm. August 6, 1984; aff'd., State Bd. of Ed., January 4, 1985.

And even though the Board may assign petitioner to teach subjects (English, arithmetic, spelling, and reading) in its secondary schools (grades 6-8), it is not compelled to do so. In fact the Board's authority to assign the teaching of common branch subjects to an elementary certified teacher is limited by N.J.A.C. 6:11-6.1(b). Further, the regulation's reference to "arithmetic" may not be sufficiently broad to cover a mathematics subject such as beginning algebra.

Although this record discusses the title "elementary certificate," it must be recognized that the proper terminology is elementary endorsement on an instructional certificate (Howley and Bookholdt, Jr., v. Bd. of Ed. of the Tp. of Ewing, OAL DKT. NO. EDU 3664-82, decided by Comm. December 20, 1982; aff'd., State Bd. of Ed., June 1,

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1983). Since the regulations provide for a secondary endorsement of an instructional certificate, it is quite obvious that a separate endorsement to teach in secondary schools is required.

None of the cases cited by petitioner are applicable, given the facts of this case. The cases cited either predate the effective date of the new seniority regulations, September 1, 1983, or they are not precisely on point. Irrespective of petitioner's argument that she was notified that she'd be RIFfed in April 1983, the record shows she was reemployed for the 1983-84, 1984-85 and 1985-86 school years. In Lois Geiling-Hurley v. Bd. of Ed. of the Tp. of Edison, OAL DKT. NO. EDU 6538-84, decided by Comm. May 24, 1985, the Commissioner (citing Camilli v. Highland Regional High School District, OAL DKT. NO. EDU 5752-84, decided by Comm. January 3, 1985; aff'd, State Bd. of Ed., May 1, 1985) held as follows:

> If the action to reduce force occurred prior to September 1, 1983, the prior seniority regulations are controlling. If the action occurred after that date, the current regulations are controlling when calculating seniority. In either circumstance, seniority determination is undertaken as a result of a reduction in force. (Slip Opinion, at p. 8).
>
> The pivotal issue in the matter herein is whether petitioner, by virtue of her seniority, had a right to claim the disputed position. Petitioner's entire service in Edison was rendered prior to the effective date of the amended seniority regulations. Her service was rendered under her elementary instructional certificate, therefore her seniority accrued in the elementary category. Hence, any vested entitlement that petitioner has accrued by virtue of her seniority is strictly limited to the elementary category.
>
> The category within which seniority accrues is defined by the regulation in effect at the time the position in question becomes vacant. The position disputed in the instant matter became vacant in or about January 1984, after the effective date of the amended seniority regulations. According to the record the vacant position was a junior high English teaching position. N.J.A.C. 6:3-1.10(l)15, the category within which this position falls reads as follows: "Secondary. The word 'secondary' shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction." *** (Emphasis supplied.)

In Geiling-Hurley, as here, when petitioner was subject to a reduction in force, she was placed on an eligibility list in the elementary category. When the mathematics

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position became open, it was in the secondary category as then defined by N.J.A.C. 6:3-1.10(1)15. Consequently, petitioner has no claim or entitlement to the position.

If the Board wished to appoint petitioner, it would not have been precluded from so doing because she possesses certification that authorizes her to teach arithmetic. This does not mean, however, that she has entitlement to the position.

Petitioner's precise seniority accrual need not be decided here since she has not been "bumped" by any other tenured teacher. Petitioner has simply not been appointed to fill a secondary position while holding an instructional certificate with an elementary endorsement.

Based on all of the above, the Board's Motion for Summary Decision is **GRANTED.**

The Petition of Appeal is **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

21 March 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

MAR [illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

MAR 26 1986
DATE

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ml/EE

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DOCUMENTS IN EVIDENCE

J-1 Petitioner's letter brief
J-2 Respondent's letter brief
J-3 Board's letter, dated January 9, 1986
J-4 Respondent's letter, dated January 25, 1986
J-5 Board's letter, dated February 27, 1986

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ARLENE REBOVICH, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

Petitioner's exceptions essentially mirror those arguments raised by way of her post-hearing brief, which are incorporated herein by reference. Petitioner's exceptions add reference to Old Bridge Education Association v. Old Bridge Board of Education, decided by the Commissioner August 8, 1985 for the proposition that elementary endorsed teachers who had taught in a departmentalized seventh and eighth grade setting prior to September 1, 1983 and who continue to teach therein after September 1, 1983 accrue, pursuant to the "tack-on" provision of N.J.A.C. 6:3-1.10(h), elementary seniority and also accrue seniority within the secondary category limited to the subject matter assignment taught. See also In the Matter of the Seniority Rights of Certain Teaching Staff Members Employed by the Old Bridge Township Board of Education and the Edison Township Board of Education, Middlesex County, decided by the Commissioner August 6, 1984, aff'd State Board January 2, 1985.

Petitioner's exceptions further add that the ALJ's reliance upon Geiling-Hurley v. Edison Township Board of Education, decided by the Commissioner May 24, 1985 is misplaced. Petitioner contends that Geiling-Hurley, on its face, is distinguishable because petitioner therein had never taught in a departmentalized setting subsequent to September 1, 1983. Petitioner points out that she was assigned to and actually taught departmentalized mathematics in a junior high school for the entire 1983-84 school year. Clearly, petitioner argues, this year of secondary teaching under the new regulations compels a different result than did Geiling-Hurley. Petitioner suggests she had at least .8 of a year of seniority in departmentalized seventh and eighth grade math at the time she was riffed. Further, petitioner avows, the hiring of a nontenured math teacher in September 1984 violates her seniority rights. Reemployment in a half-time position merely mitigates damages. Therefore, petitioner avers, the ALJ is in error and must be reversed.

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The Commissioner notes the following employment history of petitioner for the record:

YEAR	ASSIGNMENT	ENDORSEMENT
1975-76	Supplemental teacher	Elementary
1976-77	Supplemental teacher	Elementary
1977-78	Supplemental mathematics teacher, grades 7 and 8, junior high school	Elementary
1983-84	Departmentalized mathematics teacher, grades 7 and 8 - middle school (.8 position)	Elementary
8/13/84	Riffed	

The Commissioner's review of the record herein reveals that this matter can be reduced to a single question. Does petitioner have seniority in the secondary category thereby enabling her to claim that position from which she was riffed on August 13, 1984? The answer is yes.

Resort to case law in the instant matter is not necessary. The August 19, 1985 supplement to the seniority regulations speaks to this issue. N.J.A.C. 6:3-1.10(1)(16) iv states:

> iv. Persons serving under elementary endorsements in departmentally organized grades 7 and 8 prior to September 1, 1983 shall continue to accrue seniority in the elementary category for all such service prior to and subsequent to September 1, 1983. In addition, such persons shall accrue seniority in the secondary category but limited to the district's departmentally organized grades 7 and 8 and the specific subject area actually taught in such departmentally organized grades, subsequent to September 1, 1983. (emphasis supplied)

That petitioner had also been riffed in 1983 is irrelevant. So long as she was rehired after September 1, 1983 and did, in fact, accumulate teaching experience in departmentally organized grades 7 and 8, the new regulations govern and the teacher will accumulate seniority both under her elementary certificate and, limited to subject areas actually taught in such departmentally

organized grades, in the secondary category as well. See also N.J.A.C. 6:3-1.10(l)15 which states:

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> Secondary. The word "secondary" shall include grades 9-12 in all high schools, grades 7-8 in junior high schools, and grades 7-8 in elementary schools having departmental instruction.

Thus, respondent's hiring a new employee to teach seventh and eighth grade mathematics effective September 1, 1984, without regard to the .8 of a year's seniority that petitioner had accrued in that position during the 1983-84 school year was in contravention of petitioner's seniority rights.

Consequently, the Commissioner rejects the recommended decision of the Office of Administrative Law. Petitioner's Motion for Summary Decision is granted. The Commissioner directs that petitioner be reinstated with full back pay, seniority and other benefits of office due and owing her.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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ARLENE REBOVICH,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, May 8, 1986

For the Petitioner-Respondent, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Appellant, R. Joseph Ferenczi, Esq.

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

September 3, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4664-85
AGENCY DKT. NO. 174-6/85

LACEY TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
PETER MOLINARO,
Respondent.

Wilbert J. Martin, Jr., Esq., for petitioner

James Blaney, Esq., for respondent (Starkey, Kelly, Blaney & White, attorneys)

Record Closed: March 25, 1986 Decided: March 27, 1986

BEFORE DANIEL B. MC KEOWN, ALJ:

PROCEDURAL HISTORY

On or about May 20, 1985, the Lacey Township Board of Education (Board) certified to the Commissioner of Education under N.J.S.A. 18A:6-11 a written charge of conduct unbecoming against Peter Molinaro (respondent), a teacher with a tenure status in its employ, and it simultaneously suspended him without pay under N.J.S.A. 18A:6-14 from his teaching duties pending a determination on the merits of the charge by the Commissioner. The charge of conduct unbecoming is based upon respondent's "* * * arrest record * * *" (Board's Certification Resolution, May 20, 1985). On or about July 29, 1985, the Commissioner transferred the matter of the charge to the Office of Administrative Law as a contested case under N.J.S.A. 52:14F-1 et seq. Respondent then filed a formal Answer to the charge August 2, 1985, by which he seeks dismissal of the

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charge based on the lack of an indictment by the Ocean County Grand Jury. The Answer was filed before the Department of Education's Bureau of Controversies and Disputes which, in turn, forwarded the Answer to the Office of Administrative Law on August 5, 1985.

The Newark Office of Administrative Law scheduled a prehearing conference to be conducted in the matter on August 28, 1985 by the undersigned administrative law judge at the Mercerville office. Following the conduct of that prehearing conference, the following letter was sent counsel of record on August 28, 1985:

> * * * During that conference, proof problems the Board is experiencing were discussed which include the failure of the Board's chief witness in the matter to testify before an Ocean County Grand Jury and that witness' physical departure from the State of New Jersey and hence her presence at hearing through the subpoena process is beyond the jurisdiction of the Commissioner of Education.
>
> While a formal prehearing conference was not conducted as scheduled in light of the above, it was agreed that the Board by September 20, 1985 shall make a reasoned determination on the sufficiency of the remaining proofs it has to prove the truth of the charge against Mr. Molinaro. By that date, the Board may, if it elects, seek to withdraw the charge against Mr. Molinaro. If the Board seeks such withdrawal, Mr. Molinaro may, by September 25, 1985, move to dismiss the charge against him for lack of evidence. If Mr. Molinaro moves to dismiss, the Board may respond by October 2, 1985.
>
> In the meantime, however, if the Board determines it has sufficient competent credible evidence to prove the truth of the charge against Mr. Molinaro without regard to the testimony of its chief witness, another prehearing conference shall be conducted September 25, 1985.

According to the record before me, the Board considered the evidence it had to support the charge of unbecoming conduct against Mr. Molinaro. On December 10, 1985, the superintendent of schools executed a sworn affidavit in which he attests in part as follows:

> * * *
>
> 3. Peter Molinaro has submitted a letter of resignation dated September 25, 1985 and the Board of Education, at a regularly-called meeting, accepted said resignation.

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4. To the best of my knowledge, and in part, I rely on the representations of the Board attorney[.] The Board lacks competent evidence to support the charge of unbecoming conduct by reason of the fact that the alleged victim does not reside in the State and according to family members, does not intend to return to this State to testify in the matter.

5. Although the Board has no direct evidence at this time, it may come into possession of such evidence at a later date, hence, the request of dismissal without prejudice.

Board counsel, on the strength of the superintendent's affidavit, moved on January 28, 1986, to dismiss the charge without prejudice against respondent. Respondent, to the contrary, demands dismissal with prejudice of the charge certified against him by the Board on the grounds that (1) he submitted a letter of resignation dated September 25, 1985 which has been accepted by the Board, and (2) the Board has no competent evidence upon which to rely in order to prove the truth of the charge filed against him.

It appears from documents filed by the Board that the Lacey Township Police Department conducted an investigation into an allegation made against respondent that he may have committed aggravated sexual assault contrary to the provisions of N.J.S.A. 2C:14-2(b) against a pupil in the Lacey Township public schools. There is no evidence before me that respondent was ever arrested. In light of the fact the Ocean County Grand Jury did not indict respondent on the allegation, and in light of the fact the offense was alleged to have occurred privately between respondent and the victim, the Board would have to rely upon the testimony of the alleged victim to support its charge of conduct unbecoming against respondent. The alleged victim has since left the State of New Jersey and has, according to the evidence of record, no intention of returning to this State.

A dismissal of the charge without prejudice as applied for by the Board would adjudicate nothing and would itself not constitute a bar to recertifying the very same charges at some future date should the alleged pupil victim decide to return to New Jersey and to testify. A dismissal, with prejudice, on the other hand, operates as an adjudication on the merits and as such would clear the reputation and character of Peter Molinaro to the extent his character and reputation have been called into question by the certification of the charges against him by the Board. Finality and repose are desirable

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goals of controversies and disputes under Education Law. Fundamental fairness demands in the circumstances by which the Board cannot prove the truth of the charge brought against Peter Molinaro that the tenure charges be dismissed, with prejudice. See, In the Matter of the Tenure Hearing of Ralph Conrad, Penns Grove-Carney's Point Regional School District, 1985 S.L.D. — (Apr. 25, 1985). Furthermore, Peter Molinaro has already tendered his resignation from the employ of the Board, effective September 25, 1985, and, absent evidence to the contrary, it is presumed Molinaro resigned voluntarily.

Given the circumstances of this case, I **CONCLUDE** that the tenure charge certified against Peter Molinaro by the Lacey Township Board of Education must be and is **DISMISSED WITH PREJUDICE.**

A final matter remains. N.J.A.C. 6:11-3.7(b)1.1 obligates the Commissioner to forward to the State Board of Examiners for possible revocation of one's teaching certificate in "* * * cases contested before the Commissioner of Education, resulting in loss of tenure or dismissal of a teacher * * * for inefficiency, incapacity, conduct unbecoming a teacher, or other just cause * * *". In this case, the Board certified a charge of unbecoming conduct against Peter Molinaro. The Board subsequently determined it cannot prove the truth of the charge because it cannot produce the complaining witness. Consequently, the dismissal of the charge against Peter Molinaro because of an absence of proof by the Board to support the charge may not trigger the Commissioner's duty to forward the matter to the State Board of Examiners for possible revocation of his teaching certificate. Peter Molinaro has not been found to have committed conduct unbecoming as charged and, in fact, the charge of unbecoming conduct must be dismissed for lack of proof.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

March 27, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

3/31/86
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 2 1986
DATE

Mailed To Parties:

Ronald L. Parks/ES
OFFICE OF ADMINISTRATIVE LAW

ml

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OAL DKT. NO. EDU 4664-85

IN THE MATTER OF THE TENURE HEARING OF PETER MOLINARO, SCHOOL DISTRICT OF THE TOWNSHIP OF LACEY, OCEAN COUNTY.	COMMISSIONER OF EDUCATION DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The initial decision of the Office of Administrative Law is adopted by the Commissioner for the reasons expressed therein. Accordingly, the instant tenure charges are dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

MAY 9, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1313-85
AGENCY DKT. NO. 496-12/84

BARBARA YESALAVICH,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,
Respondent.

Stephen E. Klausner, Esq., for the petitioner (Klausner & Hunter, attorneys)

R. Joseph Ferenczi, Esq., for the respondent

Record Closed: March 3, 1986 Decided: March 26, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner, a teacher with a tenured status, appeals from the determination of the Board of Education of the Township of Edison (Board) which abolished her position and later reinstated her to a one-half time position. After petitioner began her employment, the Board hired a teacher full-time to the position to which petitioner claims entitlement.

This matter was filed in the Office of the Commissioner of Education on December 4, 1984. On March 8, 1985, it was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. Assigned initially to another administrative law judge, the prehearing conference scheduled for April 25, 1985, was adjourned at the Board's request. The matter was then transferred to me and the prehearing conference was held on May 14, 1985, in the Office of Administrative Law,

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Mercerville. The parties agreed that there was no factual dispute and that the issue would be presented on cross motions for Summary Decision after the filing of letter briefs and pertinent documents.

For personal reasons the Board counsel was granted an extension to August 19, 1985, to file his letter brief. The record was not complete and by telephone communication on October 28, 1985, the Board agreed that this matter should go on the inactive list because it involves the same issue, here in dispute, before the Appellate Division (OAL DKT. NO. EDU 9457-82; Agency Dkt. No. 286-7/82A). Although no objection was raised concerning an inactive status, I continued to develop the record. On October 31, 1985, the parties were required to submit additional information. When no response was received the parties were notified again by letter dated December 31, 1985, again requesting supplemental information. A response was prepared on January 9, 1986, but was not received in the Office of Administrative Law until January 29, 1986. (I was on sick leave from January 6 to February 3, 1986). Petitioner's response to the Board's letter was also received on January 29, 1986. Counsel replied in writing, received on March 3, 1986, to my telephone request for an explanation to the Board's letter received on January 29, 1986. That letter (J-5) included information relevant only to a companion case (EDU 1314-85, Rebovich v. Edison).[1] Therefore, on March 3, 1986, the record was closed.

ISSUE

Should petitioner have been appointed to the full-time position which was available on September 10, 1984, by virtue of her greater seniority, despite the fact that she had been employed in a one-half time position at the beginning of the school year (September 1, 1984).

FACTS

The facts in this matter are not in dispute. Petitioner is a tenured teacher employed by the Board. She holds an instructional certificate with a K-8 endorsement as an elementary school teacher. All of her experience has been as an elementary school

1 This matter was originally consolidated with Rebovich but has been separated because the issues are different.

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teacher. As of June 30, 1985, petitioner had earned 7 years, 5 months and 20 days seniority (J-3).

On April 15, 1984, the Board resolved to abolish petitioner's position for reasons of economy or because of a reduction in the number of its pupils. Petitioner completed the 1983-84 school year. On August 13, 1984, petitioner was reemployed, effective September 1, 1984, in a one-half time elementary school position. On Monday, September 10, 1984, after three days of school,[2] the Board reemployed another teaching staff member with lesser seniority in a full-time position to which petitioner claims entitlement.

I adopt the foregoing as my **FINDINGS OF FACT.**

Because the Board concedes that petitioner has greater seniority than the teacher it reemployed on September 10, 1984, it appears relatively simple to declare that petitioner has the entitlement to the full-time elementary position. However, the Board argues that petitioner is not entitled to the position because of the "natural break" agreement it negotiated with the Edison Township Teachers Association, of which petitioner is a member.

CONCLUSIONS OF LAW

In support of its position the Board relies on Edison Tp. Educ. Ass'n. et al v. Edison Tp. Bd. of Ed., OAL DKT. NO. EDU 9457-82 (Nov. 14, 1983), decided by the Comm. (December 29, 1983); aff'd. State Bd. of Ed. (August 8, 1984), aff'd. N.J. App. Div. February 26, 1986 (A-515-84T7) (unreported). In Edison, the ALJ described a natural break as one occurring within a day or two of the end of a marking period or within a day or two of Christmas vacation. The Board contends that this natural break is an agreement between it and its Association, as a term and condition of employment to which both agreed after negotiations on the subject. The Board asserts that it is educationally sound not to disrupt pupil schedules by the changing of a teacher at any time other than what is labeled a natural break. Petitioner relies on the same decision and argues that the concept of natural break cannot supersede the seniority regulations.

2 School began on Wednesday, September 5, 1984.

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While this issue of natural break was being considered, the Appellate Division decided Edison and affirmed the Commissioner and the State Board of Education decisions which struck down the concept of "natural break." (N.J. App. Div. February 6, 1986, A-515-84T7) (unreported).

Accordingly, the Board's determination to hire a less-senior teacher to the position sought by petitioner is in error.

Based on the foregoing, Barbara Yesalavich is entitled to reinstatement in the full-time position for which she was eligible, effective September 1, 1984.

The Board is **ORDERED** to compensate petitioner the difference in the salary she should have received and the salary she actually received for the 1984-85 school year, together with any other benefits and emoluments of that full-time position.

It is so **ORDERED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

26 March 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

3/31/86
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1986
DATE

Ronald L. Parke/ss
OFFICE OF ADMINISTRATIVE LAW

bc/ee

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BARBARA YESALAVICH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EDISON, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The initial decision of the Office of Administrative Law is adopted by the Commissioner for the reasons expressed therein. Accordingly, petitioner is entitled to reinstatement in the full-time position for which she was eligible, effective September 1, 1984. The Board herein is directed to compensate petitioner the difference in the salary she should have received and the salary she actually received for the 1984-85 school year, together with any other benefits and emoluments of that full-time position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 13, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1202-86
AGENCY DKT. NO. 48-2/86

C.J., ON BEHALF OF HER MINOR CHILDREN, R.J. AND D.J., JR.,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,
Respondent.

Thomas J. Bass, Esq., for the petitioner (Bloom, Ocks & Fisher, attorneys)

Ronald J. Ianoale, Esq., for the respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: March 7, 1986 Decided: March 31, 1986

BEFORE **AUGUST E. THOMAS**, ALJ:

Petitioner (C.J.) filed an appeal for emergency relief with the Commissioner of Education on February 21, 1986, seeking the admission of her two children, R.J. and D.J., Jr., to the Sacred Heart School, a public school operated by the Board of Education of the Borough of Palmyra (Board). The Board denied them admission, stating that their domicile is in Philadelphia, Pennsylvania. The Philadelphia school system asserts that the children live in New Jersey; consequently, they were denied schooling in Philadelphia.

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The Commissioner of Education transferred this matter to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq., on February 25, 1986. The emergency hearing was conducted on March 3, 1986, in the Office of Administrative Law, Mercerville.

Petitioner's emergent relief appeal was granted pending a full hearing on the merits. For reasons which will be explained, the Board was Ordered to admit R.J. to its schools immediately; D.J., Jr., was not admitted for educational reasons. A hearing on the merits was conducted on March 7, 1986, at the Office of Administrative Law. Testimony was taken and documents were admitted in evidence. Counsel presented letter briefs and the record was closed.

POSITIONS OF THE PARTIES

The Board relies on its interpretation of case law regarding domicile, asserting that the father is domiciled in Philadelphia; therefore, the children are domiciled in Philadelphia.

The Philadelphia school system asserts that in accordance with its regulations, children have a right to attend school where they live. And since the children live with their mother in Palmyra, they have no entitlement to a free public school education in Philadelphia.

FACTS

The salient facts in this matter are not in dispute. The issue is the domicile of the two children, given the fact that their father resides in Philadelphia, and the children reside with their mother in Palmyra.

Petitioner's husband (D.J.) is a firefighter in Philadelphia. His job requires him to reside in the city. C.J. and D.J. jointly own a home in Philadelphia where D.J. lives and sleeps, except on his days off, which he spends in Palmyra. C.J. and D.J. also jointly own a home in Palmyra which they acquired in 1985. C.J. owns and operates a vitamin store business from her Palmyra storefront home (a three-story house), and she is

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registered to vote in New Jersey. C.J. and her two children have been residing in Palmyra "off and on" since December 1984. She took up permanent residence in Palmyra with her children in December 1985.

Petitioner presented evidence of her domicile in Palmyra. She testified that she is self-employed and operates her Health & Heritage Vitamins Shoppe which is attached to her home. She works there 15 hours per day, 6 days per week and sleeps at her home 7 nights each week. C.J. belongs to a church in Burlington Township and attends a.m. and p.m. sessions with her family on Sundays. She has not attended church in Philadelphia for two or more years.

C.J. has a joint bank account with her husband and she is a member of the firefighters' credit union. Her banking is free. D.J. physically transports the daily receipts from the store to the firefighters' credit union in Philadelphia. Both own credit cards jointly. C.J. pays property taxes in Palmyra and it is her intention to reside there permanently. C.J. drives but has no automobile. Their one automobile is registered in Pennsylvania. When she first purchased the New Jersey property she commuted to her store. D.J. assists C.J. in all phases of her business whenever he is not on duty.

C.J. and D.J. will have been married 11 years in May 1986. They have never had a legal separation.

D.J. is 42 years of age. As a firefighter he can collect a pension at age 45. Firefighters are required to have residency in the city. He intends to continue to work until age 46, at which time he plans to buy back enough service time to retire with 20 years in his pension fund. He testified that it is his wife's intention to stay in Palmyra and it is his intention to move there upon retirement. He works four days in succession with three days off. His weekly shifts total forty-eight hours. D.J. is off duty on five nights each week. On those five nights, he spends three in Philadelphia and two in Palmyra. He also works in the Palmyra store on his three days off.

The superintendent testified in regard to the Board's educational reason for denying admission to D.J., Jr. The Board does not admit children to kindergarten after October 1 if they have not had any formal schooling. This policy has been in effect and enforced for 10 years (R-5; N.J.S.A. 18A:38-6). Parental requests for such admissions are

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decided individually by the Board. In this case, after meeting with C.J. and its agents, the Board decided not to admit D.J., Jr., until September 1986 because petitioner's five-and-a-half-year-old son was presented after October 1, 1985, and had never attended any formal school. (N.J.S.A. 18A:38-6.) The Board believed that it would be in D.J., Jr.'s educational interest to delay his admission until fall 1986. Pre-kindergarten registration and readiness begins in March 1986.

R.J., petitioner's nine-year-old daughter, was denied admission to school because the Board determined that her father is domiciled in Philadelphia. R.J. had never attended any formal public or private school until September 1985. R.J. had attended an informal school, a day care center owned and operated by C.J., who had determined to teach her children at home. C.J.'s day care center had 30 children and was operated by a psychologist. C.J. has less than one year of college education.

Details leading to the Board's position are set forth as follows.

In the spring of 1985, when petitioner was spending more of her time in Palmyra, neighbors began calling the school to report that school age children were playing in the street. School personnel investigated and learned from C.J. that the children were living at the storefront home but would be going to school in Philadelphia.

In the fall of 1985, C.J. began to inquire about the Palmyra schools and visited the principal in November 1985. However, she did not attempt to register either child until December 12, 1985, when she requested admission to kindergarten for D.J., Jr. (R-1). C.J. did not ask to register R.J. who, at that time, attended a catholic school in Philadelphia from September to December 21, 1985.

In January 1986, C.J. requested school admission for her daughter R.J., and on January 27, 1986, she was advised that R.J. could begin attending school on Wednesday, January 29, 1986 (R-3). Aware of the Board's concern over her residency, C.J. notified the superintendent that she'd present R.J. for registration only if she was assured that R.J. would remain in school for the remainder of the year (R-4). However, without such assurance, C.J. registered R.J., who began attending grade four on February 12, 1986.

Board counsel solicited a series of answers from C.J. to his questions concerning her domicile. When these answers were analyzed, the Board believed that in

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accordance with current case law, C.J. was not domiciled in Palmyra. The Board met on the evening of February 18, 1986, to discuss the question of domicile, and learned from the parents that D.J., Jr., had been enrolled in kindergarten on that very same date in a Philadelphia school, using his father's address. Whatever doubt it had about domicile was erased, and the Board declared that the Philadelphia home was the domicile of C.J. and her children. It resolved to drop R.J. from its rolls and tried to notify both parents in writing at each of their addresses. The parents refused to accept both letters (R-6).

Although C.J. testified that D.J., Jr., was dropped from the rolls at the Philadelphia school, an affidavit by that school's principal states that D.J., Jr., attended school on February 19, and was absent on the 20th and 21st. The 22nd was a holiday. For the conclusions reached in this decision, I will rely on C.J.'s testimony that the children were denied admission to the Philadelphia schools.

I adopt the foregoing as **FINDINGS OF FACT.**

CONCLUSIONS OF LAW

The case law holds that a child's domicile is that of the father unless a marital offense creates in the wife a right to a separate domicile. The facts in this case do not demonstrate that there has been any marital offense; therefore, the domicile of the father must be determined based on the above specific facts.

The Commissioner has held that a child's domicile is determined by the father's residence. P. v. Irvington Bd. of Ed., 1971 S.L.D. 180. The New Jersey Supreme Court has held that the question of domicile is one of fact, and that each case must be evaluated and determined by its own facts and circumstances. Lea v. Lea, 18 N.J. 1 (1955).

In Lea the father was employed by the Federal Immigration Service. At times he was assigned to different places around the country. The family lived together until 1945 when the father, living in Louisiana, sent his wife and son to New York to live for various reasons. The New Jersey Supreme Court held that the domicile of a wife and children is that of her husband, in the absence of a marital offense which would create in

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her a right to a separate domicile. The Court also found that the fact of domicile is largely a matter of intention on the part of the husband to establish a home for his family, and it held that where a man has his family is a very important and most times a controlling factor on the question of domicile. Conceding that the domicile of the wife and children must follow that of the husband, the Court also found a corollary to that proposition. The Court held that if the husband orders and directs his wife to establish a home in a certain place, then that place is the domicile of the husband and his family unless there is clear and convincing proof of a contrary bona fide intention. (Id. at 11.)

In the Lea case the family lived together on a New York farm until 1942, when they sold the farm and traveled to Revere, Mass. for two years and then to Louisiana for one year, after which, in 1945, the father sent the rest of the family back to New York to live. The Court did not consider the father's attempts to live in Louisiana proof of a bona fide intent to establish a family domicile. The Court concluded that the family domicile and the domicile of the father was in the state of New York. (Ibid.)

The word domicile used in its ordinary sense means one's home. See, O'Hara v. Glaser, 60 N.J. 239, 248 (1972). Where there is more than one residence, "domicile is that place which the subject regards as his true and permanent home." Citizens Bank & Trust Co. v. Glaser, 70 N.J. 72, 81 (1976).

N.J.S.A. 18A:38-1(a) provides that public schools shall be free to persons over 5 and under 20 years of age, if that person "is domiciled within the school district." What constitutes a person's legal domicile is the basis for this dispute.

Every person has a domicile at all times, and no person has more than one domicile at any one time. In re Gillmore's Estate, 101 N.J. Super. 77 (App. Div. 1968), cert. den., 52 N.J. 175 (1968). The person "may have several residences but can have only one permanent home to which legal incidents of domicile attach." Trustees of Princeton University v. Trust Company of New Jersey, 22 N.J. 587 (1956). In other words, the terms "residence and domicile" are not interchangeable; a person may acquire several residences but only one domicile. DiFiore v. Erie-Lackawanna R.R. Co., 67 N.J. Super. 267 (Law Div. 1961).

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In Gillmore, the court used the following language:

> Domicile may be acquired in one of three ways: (1) through birth or place of origin; (2) through choice by a person legally capable of choosing his domicile, and (3) through operation of law in the case of a person who lacks capacity to acquire a new domicile by a choice [at 87]. (Emphasis added.)

This language seems to recognize the fact that a "person" can choose her domicile as long as she is "legally capable." There is no evidence that C.J. is not of age, is incompetent, or legally incapable. Where a person has two homes in which he lives and between which he divides his time, it is still his intention which creates one or the other as his domicile. Collins v. Yancey, 55 N.J. Super. 514 (Law Div. 1959). Gosschalk v. Gosschalk, 48 N.J. Super. 566 (App. Div. 1958), aff'd. 28 N.J. 73, cited by the Board, dealt with divorce and is factually distinguishable from the present matters. However, the identical requisites it established for domicile are met by C.J.

An exception to the common law regarding domicile is recognized in the Conflict of Laws, Restatement, 2nd, as follows:

> On the other hand, there will be extremely rare situations where a wife who lives with her husband has a domicile apart from his. These will be situations where, at least for purposes at hand, the wife has chosen ties with some other state than with the state of the husband's domicile and regards this other state as her home. (Restatement, 2nd § 21, p. 85, Conflict of Laws.)

In another case, V.R. on behalf of A.R. v. Bd. of Ed. of the Borough of Hamburg, 2 N.J.A.R. 283, October 17, 1980; decided by the Comm., December 5, 1980, a father residing in New York attempted to have his daughter enrolled in a public school in New Jersey. The child had been living with a relative in New Jersey for over four years when the action was brought. The petitioner-father argued that "changing times" should allow an unemancipated minor to acquire a domicile other than that of the father's.

In determining that the child's domicile would follow that of the father under the facts of that case, the administrative law judge allowed for exceptions to the general rule as follows:

> Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale [i.e. child's domicile follows that of father as a result of child's

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> dependence on father for support, maintenance, etc.]. For example, the rising recognition of women's independence is reflected in the Conflict of Law Restatement, Second Sec 21 (1971) where a wife, under special circumstances, may have a different domicile from her husband, even if she is living with him. Id. at 286-287.

The record shows that C.J. earned a substantial profit in her business for the 1985 taxable year and she is a provider for her children.

Among the factors that are important in determining the domicile of a person who has more than one residence are the physical characteristics of each, the time spent and the things done in each place, the other persons found there, the person's mental attitude toward each place, and whether there is or is not an intention, when absent, to return. Mercadante v. City of Paterson, 111 N.J. Super. 35, (Ch. Div. 1970), aff'd. 58 N.J. 112 (1971).

The Board's reliance on several court cases establishing the wife's domicile as that of her husband's is without merit. Each of those cases deals with the establishment of a litigant's rights because of a separation, divorce, or a will. The factual bases of these cases have little or no parallel with the instant matter.

In the present case, the house in Palmyra is the place where domicile is intended. The father certainly consents to the family establishing a home in Palmyra, he spends all his days off there, and apparently it is the place he wants his children to live. However, for purposes of his job, the father also resides in Philadelphia.

CONCLUSION

I CONCLUDE that the intent of the father to raise his family in Palmyra and not Philadelphia, where he has residences in both places, demonstrates that his domicile is in Palmyra.

Accordingly, the children are domiciled in Palmyra and have a statutory right to attend its public schools. R.J. has already been enrolled in accordance with my Order for emergent relief. D.J., Jr., was denied for educational reasons which have a statutory basis (N.J.S.A. 18A:38-6).

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

31 March 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

APR - - 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 1 1986
DATE

Ronald L. Parker/K.S.
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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C.J., on behalf of her minor children, R.J. and D.J., Jr.,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF PALMYRA, BURLINGTON COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were timely filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c. Petitioner's exceptions and reply exceptions were submitted pro se.

While agreeing with the final conclusion of the ALJ admitting R.J. to the Palmyra schools, petitioner's primary exceptions aver that New Jersey law concerning domicile is sexist in that it requires the domicile of the wife to be that of the husband unless there has been a marital offense. She requests that the following language be substituted for that of the initial decision:

> I conclude that the intent of the mother, (instead of the father), is to raise her children in Palmyra, where she has proven residence, demonstrates that the Petitioner's domicile is in Palmyra, and not Philadelphia.
> (Petitioner's Primary Exceptions, at p. 1)

Petitioner further would like it to be known that D.J., Sr. has no intention of establishing his domicile in New Jersey.

The Board's primary exceptions are summarized below.

1. THE FACTS OF THE LEA CASE ARE DISTINGUISHABLE FROM THE FACTS HERE.

The Board avers that the ALJ relied on Lea v. Lea, 18 N.J. 1 (1955) to support the proposition that D.J., Sr. directed and ordered his wife and children to establish a home in Palmyra, New Jersey; consequently, Palmyra is now the domicile of D.J., Sr., his wife and children.

The Board objects to the ALJ's dismissing the Board's proffered cases dealing with divorce, support and wills because "[t]he factual bases of these cases have little or no parallel with the instant matter***" (Initial Decision, ante), and then relying on Lea, which was an action by a wife for support and maintenance as a result of a New York divorce judgment. The Board contends that D.J., Sr. never directed or ordered his wife or his children to move to Palmyra. Therefore, the facts of this case are distinguishable

from Lea, and the Commissioner should not rely on the dictum in Lea in deciding the outcome of this case.

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2. D.J., SR. AND HIS MINOR CHILDREN ARE DOMICILED IN PENNSYLVANIA AND NOT IN NEW JERSEY.

The Board avers that the initial decision established that a child's domicile is determined by the father's residence. The Board cites the initial decision at p. 5 and Mansfield Township Bd. of Ed. v. State Board, 101 N.J.L. 474, 129 A. 765, 767 (Sup. Ct. 1925) for this proposition. The Board also cites the transcripts of the hearing before the ALJ to support the fact that D.J., Sr. intends to remain domiciled in Pennsylvania The Commissioner notes that a complete set of the transcripts of the proceedings below was not provided in the record, however, which precludes his consideration of testimony made therein. The Board refers also to the Philadelphia Home Rule Charter, Section 7-401(u), which requires a firefighter such as D.J., Sr. to be a bona fide resident of the City of Philadelphia. Further, the Board refers to Lea, supra, at 296 and the Restatement 2d, Conflict of Laws, Section 19, Comment c at 78 for the proposition that once a domicile is established, it continues until it is superseded by another domicile and, further, that the burden of proof to establish a change of domicile rests upon the party asserting it. The Board contends that the evidence conclusively favors D.J., Sr. to be domiciled in the City of Philadelphia.

3. THE WIFE OF D. J., Sr. HAS NOT ESTABLISHED A SEPARATE DOMICILE.

The Board avers that the ALJ's reliance on In re Gillmore's Estate, 101 N.J. Super. 77 (App. Div. 1968), cert. den. 52 N.J. 175 (1968) for the proposition that C.J., a married woman, is legally capable of choosing her domicile is misplaced, especially after the ALJ asserted earlier in his decision that a wife can create a domicile only if a marital offense exists within the marriage. (Board's Exceptions, at p. 8, citing the Initial Decision, ante) The Board argues that in Gillmore the issue was of a senile widow's requisite mental capacity to make a new domicile by choice. Further, the Board urges that Section 21 of the Restatement 2d, Conflict of Laws, has never been adopted by any court in this state and therefore cannot be relied upon by the Commissioner.

The Board also refutes the ALJ's reliance on V.R. v. Hamburg Board of Ed., 2 N.J.A.R. 283 (1980 S.L.D. 1380) and the language therein that speaks to "'changing times' and women's growing independence." (Board's Exceptions, at p. 9, quoting the Initial Decision, ante) The Board contends that the language upon which the ALJ relied was mere dictum. The court held that petitioner's daughter must share her parents' domicile regardless of her physical location until emancipation. (Board's Exceptions, at p. 9) The Board urges the earlier conclusion of the ALJ that a wife can obtain a separate domicile only when a marital offense exists. Since no marital offenses exist herein, the Board argues, the

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domicile of the wife and children of the union is that of the father.

Finally, the Board argues that petitioner is "manipulating the law of two different jurisdictions -- Palmyra and Philadelphia -- in order to accommodate their respective needs at the expense of the taxpayers of both jurisdictions." (Board's Exceptions, at p. 10) The Board contends that the ALJ's declaration that D.J., Sr. is domiciled in Palmyra jeopardizes his ability to continue his employment as a Philadelphia firefighter. The Board maintains that D.J., Sr. is domiciled in Philadelphia and therefore his children must follow the domicile of their father since no marital offense exists to enable his wife to establish a separate domicile. The Board suggests that if the Commissioner rules in favor of the Board, tuition be assessed against the parents for the attendance of R.J. in the Palmyra Public Schools from February 12, 1986 to the present. The Board suggests also that it is willing to allow R.J. to continue in its school system on a tuition basis with the same privilege afforded D.J., Jr. upon his enrollment in September 1986.

Petitioner's reply exceptions, inter alia, state emphatically that D.J., Sr. did not direct her or their children to establish a home in Palmyra, New Jersey. Rather it was of petitioner's own choosing, as a self-supporting provider for herself and their two children. Further, petitioner takes exception to the Board's argument regarding Philadelphia's Home Rule Charter and the term "bona fide" resident. Petitioner concedes that a Philadelphia firefighter must establish a "bona fide" residence, but that it has not been stated that the term "bona fide" residence shall be equated with the term "domiciliary intent", which remains undefined. (Petitioner's Reply Exceptions, at p. 2)

Further, petitioner's reply exceptions state that In re Gillmore's Estate, supra, and Restatement 2d, Conflict of Laws, Section 21 at 85 support the proposition that a female and her offspring may establish domicile separate from her husband's. Further, petitioner strongly agrees with the ALJ's reliance on V.R., supra, for the proposition that "changing times" should affect the domicile laws. Petitioner asserts that she generates her own income, thereby rendering their dependence on their father non-applicable in the instant matter.

Petitioner's reply exceptions express alarm at the Board's opinion that she and her husband are attempting to manipulate the laws in two jurisdictions to accommodate their needs. She stresses that she is a homeowner in New Jersey and that her husband is a homeowner in Pennsylvania; therefore, they pay approximately $3,500 - $4,000 in state, local and school taxes in both jurisdictions. She suggests that the notion of manipulation of two jurisdictions is an "unwarranted opinion by the board and without sound merit." (Petitioner's Reply Exceptions, at p. 6) Petitioner further denies any suggestion by the Board's counsel that she was less than forthright in trying to enroll her son at a Pennsylvania public school after trying to register her daughter at a public school in New Jersey. Petitioner avers she "discussed all the details of the

situation" with the principal of the Pennsylvania school, and that both children were eventually denied admission there because they were living in Palmyra. (Petitioner's Reply Exceptions, at p. 8) Petitioner concludes that she and her two children "are full time tax paying residents, domiciled in the Borough of Palmyra, and therefore wish to secure my rights in obtaining a free public education for my 2 children, [R.J. and D.J., Jr.]" (Petitioner's Reply Exceptions, at p. 10) She requests that the Commissioner allow the ALJ's initial decision in this case to stand, with the exception that D.J., Sr. is not domiciled in Palmyra. Finally, petitioner states that as a taxpayer in Palmyra, she would "take very strong exception to paying for tuition for my children to attend public school." (Petitioner's Reply Exceptions, at p. 11)

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Upon review of the record in this matter and the arguments raised by the parties, the Commissioner adopts the recommended decision of the Office of Administrative Law for the following reasons.

It is entirely clear from the record herein that petitioner, of her own free will, has established a domicile in New Jersey separate from her husband, from whom she is not separated. It is also clear from the record that the couple's children reside in New Jersey with their mother on a permanent basis and that their father joins them in Palmyra whenever his work as a Philadelphia firefighter schedule permits.

The Commissioner notes with approval the ALJ's discussion of V.R., supra. The Commissioner adds to that discussion the fact that the State Board affirmed the Commissioner's decision on April 1, 1981. Thereafter, the matter was appealed in the United States District Court, District of New Jersey, under the caption Abby Rabinowitz v. New Jersey State Board of Education, 550 F. Supp. 481 (1982). The Court reversed the State Board decision and established that A.R., a severely retarded, 11-year-old child in the care of a non-relative on a boarding basis from the time she was two months old, was a resident of New Jersey for the purposes of her education, notwithstanding the fact that her parents remained, at all times, residents of New York. Therein the Court stated:

> In determining whether New Jersey has an obligation to provide plaintiff with an education, the court will accept the ALJ's finding that under New Jersey law there is no obligation to educate the child because she is technically domiciled in New York. The court does note, however, that the New Jersey Supreme Court has recognized that the concept of domicile must be applied flexibly case by case to ensure that the right result is accomplished given a certain set of facts. Worden v. Mercer County Board of Elections, 61 N.J. 325 (1972).
> (emphasis supplied)(Slip Opinion, at p. 8)

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Further, the Court applied this flexible standard regarding domicile along with another standard of review articulated in Stemple v. Board of Education of Prince George's County, 623 F.2d 893 (4th Cir. 1980), cert. den. 450 U.S. 911 (1981) and held that

> ***where the reasons for her being placed here were bona fide and not for purposes of obtaining a free education *** and where to uproot her would be traumatic and dysfunctional, then the state has an obligation to provide the child with a free appropriate education***.
>
> (Id., at 16, quoting Stemple)

The Commissioner finds no merit in the Board's allegation that petitioner herein "manipulated" two jurisdictions to accomplish her own purposes. Both the Palmyra school district as well as the Philadelphia school system rejected C.J.'s application for admission of her children to the public schools. Petitioner cannot be faulted for attempting to gain entrance for either of her children in the Pennsylvania district when her home-state district in New Jersey failed to provide that which is required by both states: access to a free, public education for the children domiciled therein.

Under the special circumstances herein, to find for the Board would require the children of C.J. and D.J., Sr. to continue to live in New Jersey and travel to Pennsylvania to attend public school or to move them permanently to Pennsylvania. The Commissioner finds that neither alternative is acceptable. The Commissioner supports the analysis advanced by the ALJ that petitioner has carried her burden of proving that she falls within the exception to the common law that establishes that the domicile of the wife is that of her husband unless there has been a marital offense or the husband has directed the wife to establish separate domicile from his own. This exception to the general rule is elaborated upon in the comments contained in Restatement 2d, Conflict of Laws, Section 21 at 85:

> d. Domicil of wife living apart from husband. The harshness of the common law rule that a married woman could have no domicil apart from that of her husband (see Comment a), first became apparent in the field of divorce. It was unfair that a deserted wife could bring suit for divorce only in the state, however distant it might be, where her husband had chosen to establish his new home. The first step in modifying the rule was to say that a husband, once he had given his wife cause for divorce, no longer enjoyed the power to change her domicil. Her domicil remained in the state where the spouses had last lived together as man and wife, and accordingly the wife could there

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> bring suit for divorce or separate maintenance. The rule was then further liberalized by permitting the wife under such circumstances to acquire a new domicil of her own in any state where she might choose to go. It was also made clear that her power in this regard was not restricted to the bringing of marital actions; if she could acquire a domicil of choice for one purpose, she could do so for any purpose. Williamson v. Osenton, 232 U.S. 619 (1914). Gradually, the same power was accorded the wife in situations where the spouses had separated by mutual consent rather than because of the fault of the husband. At this period, therefore, the wife could have a domicil of her own provided that she was dwelling apart from her husband and was doing so justifiably, or, as stated in the original Restatement of this Subject, which appeared in 1934, if she had not been guilty of desertion in leaving him. Today, the power of the wife has been broadened still further. If there has been an actual rupture of marital relations, she may acquire a separate domicil of her own even though she was the party at fault. And she may likewise do so if for any reason she is living apart from her husband even though her relations with him are wholly amicable. (emphasis supplied)(Conflict of Laws, supra, at Comment d, pp. 109-110

The Commissioner cannot fully agree with the Board's contention that "[u]nfortunately, this section of the Restatement has never been adopted by any court in this state and therefore cannot be relied upon by the Commissioner." (Board's Exceptions, at p. 9) While the Commissioner's research leads him to recognize that, to date, Voss v. Voss, 5 N.J. 402 (1950) (in order for a wife to establish a separate domicile there must be more than a passive consent or acquiescence to such a marriage state on the part of the husband) has not been reversed, Worden v. Mercer County Board of Elections, 61 N.J. 325, requires that the domicile concept must be applied flexibly. Further, our sister states of Connecticut (Boardman v. Boardman, 135 Conn. 124, 62 A.2d 521 (1948)) and Delaware (Burkhardt v. Burkhardt, 38 Del. 492, 193 A.924 (1937)) have long since recognized the broader power of a wife to establish domicile apart from her husband. The Commissioner notes these decisions and comments with approval in light of the paucity of recent New Jersey case law on point.

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Accordingly, the Commissioner adopts the conclusion of the Office of Administrative Law for the reasons expressed, as modified herein. The Commissioner finds that C.J. has established a separate domicile from her husband, D.J., Sr., in the State of New Jersey. The Commissioner further finds that the children of C.J. and D.J., Sr., are domiciled in Palmyra and have a statutory right to attend its public schools. It is hereby ordered that R.J. remain enrolled at the public school in Palmyra that she now attends. It is further ordered that D.J., Jr. be registered for attendance in the Palmyra School District at such time as his age makes it appropriate.

COMMISSIONER OF EDUCATION

May 14, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6855-85
AGENCY DKT. NO. 330-9/85

DIANE VELDRAN, GAIL GALANDAK, MARLENE ROVERSE, SUSAN KNAUSS and SUSAN SUNDBERG,

Petitioners

v.

BOARD OF EDUCATION OF FRANKLIN BOROUGH,

Respondent

Robert A. Pagella, Esq., for petitioners
(Zazzali, Zazzali & Kroll, attorneys)

Richard H. Bauch, Esq., for respondent
(Aron & Salsberg, attorneys)

Record Closed: February 14, 1986 Decided: March 27, 1986

BEFORE **WARD R. YOUNG**, ALJ:

Petitioners, non-tenured part-time teaching staff members (Sundberg excepted) at the time of filing and assigned to teach in the Basic Skills Improvement Program (BSIP), alleged impropriety on the part of the Franklin Borough Board of Education (Board) in denying them the compensation and benefits afforded other part-time teaching staff members. They seek retrospective and prospective relief.

The Board denies the allegation and seeks dismissal of the Petition pursuant to N.J.A.C. 6:24-1.2 and/or laches.

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6. All petitioners received lesser benefits as BSIP teachers than other teacher staff members.

7. Petitioners were required to possess valid teaching certificates, and all are properly certified.

8. BSIP teaching staff members are excluded from representation by the sole teachers' bargaining unit, the Franklin Education Association (FEA).

9. The following are the employment histories of petitioners as teaching staff members in the employ of the respondent Board:

   a) Diane Veldran - employed as a BSIP teacher since September 1, 1984 for less than 20 hours per week.

   b) Gail Galandak - employed as a BSIP teacher since March 25, 1985 for less than 20 hours per week.

   c) Marlene Roverse - employed as a BSIP teacher since January 25, 1984 for less than 20 hours per week.

   d) Susan Knauss - employed as a BSIP teacher since January 17, 1983 for less than 20 hours per week until her appointment as a full time teaching staff member on November 4, 1985.

   e) Susan Sundberg - employed as a BSIP teacher since October 22, 1980 for less than 20 hours per week until her appointment as a full time teaching staff member on October 22, 1985.

10. The hourly rates of compensation for BSIP teachers were $9.50 in 1982-83 and 1983-84, $11.00 in 1984-85, and $11.50 in 1985-86.

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The following **FINDINGS OF FACT** are adopted herein resulting from a review of the negotiated agreement (J-4) and a supplemental stipulation from the parties:

1. The FEA is recognized by the Board as the majority representative for the teaching staff, nursing staff, part-time and full-time teachers, excluding BSIP, Chapter I and Compensatory Education staff members.

2. The method of compensation for part-time teachers represented by the FEA is pro rata pursuant to the salary guide for regular teachers.

3. The benefits afforded part-time teachers represented by the FEA are the same as for full time teachers if they are employed for more than 20 hours. If less than 20 hours, there are no benefits.

Heavy reliance has been placed on Francis W. Hyman, et al. v. Board of Education of the Twp. of Teaneck, 1983 S.L.D. ____ (decided August 15, 1983), rev'd State Bd. of Ed., 1985 S.L.D. ____ (decided March 8, 1985), aff'd App. Div. A-3508-8477 (decided February 26, 1986). In that matter, the State Board said:

> . . .[N]either the tenure statutes nor those governing compensation confer on teaching staff members the right to placement on any particular salary guide. Nor does the decision in Spiewak create such right. We therefore conclude that supplemental teachers are not entitled by law to placement on the salary guide for full-time classroom teachers.
>
> . . . .
>
> Thus, boards and teachers are free to negotiate terms of compensation within the parameters set by the education laws and specific department rules or regulations. [Id., at 11].
>
> [T]he compensation statutes do not require that full-time teaching staff members be paid any specific salary but merely set minimum salaries. N.J.S.A. 18A:29-5, 7, 12 . . . Nor do the statutes require that salary credit be given for teaching experience outside the district or for experience in business. [Id., at 14].

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> In sum, we conclude that the decision in Spiewak does not mandate the placement of supplemental teachers on the salary guide for regular teaching staff members and that such right is contained in neither the tenure statutes nor those governing compensation. Because supplemental teachers are not entitled to guide placement as a matter of law, we hold that separate guides covering supplemental teachers are permissible so long as such guides conform to the requirements established by the school laws. . . . [Id., at 16].

The Commissioner also addressed the State Board's determination in Hyman in Connor, et al., and Gladstone, et al. v. Bd. of Ed. of the Borough of River Vale, 1986 S.L.D. _____ (decided February 18, 1986) and said at slip opinion 32, 33:

> The State Board in Hyman, supra, determined that the tenure statutes do not confer to any teaching staff member the right to placement on a salary guide. Further, its analysis of the pertinent statutes concerning compensation of teaching staff members led the State Board to conclude that those statutes (N.J.S.A. 18A:29-4.1 et seq.) apply only to full-time members. Of this it stated:
>
> > * * * In sum, the statutes governing compensation apply only to full-time teaching staff members and, therefore, do not confer the right to placement on any salary guide to part-time teachers. Further, there is no requirement that a board adopt a salary policy for its full-time teaching staff members, although it is authorized to do so under N.J.S.A. 18A:29-4.1. * * *
>
> (Slip Opinion, at p. 10)

I FIND that compensation for petitioners based on a pro rata full-time teaching salary guide placement is not a statutory entitlement.

It is noted herein, as was noted by the Commissioner in Connor and Gladstone, the negotiated agreement between the FEA and the Board (J-4) excludes representation of part-time staff specially funded with private, state or federal monies, a factor which appears to be clearly contrary to numerous court decisions which dictate that source of funding cannot be used to differentiate teaching staff members. Spiewak v. Bd. of Ed. of

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Rutherford, 90 N.J. 63 (1982). Nevertheless, jurisdiction concerning unit clarification matters rests with the Public Employment Relations Commission.

It could be argued that part-time teachers not represented by FEA (petitioners herein) cannot be treated differently than part-time teachers who are represented by the FEA. This was put to rest by the Commissioner in Trucillo v. Bd. of Ed. of the Town of Kearny, 1985 S.L.D. _____ (decided November 25, 1985), wherein the Board negotiated and established differentiated salary schedules for a full-time psychologist (recognizing training and experience) and a per diem compensation policy for a part-time psychologist (with no recognition for training and/or experience). The Commissioner held there was nothing to preclude a board from establishing different salary schedules for compensation purposes for full-time psychologists and part-time psychologists, when in that instance, both were represented by the bargaining unit.

The argument of petitioners that the respondent Board herein has not recognized their tenure eligibility in the positions they hold is determined herein to be without merit, as the record is void of any evidence in support thereof.

I FIND no entitlement in statutory or decisional law for placement of petitioners on the teachers' salary guide. **I FURTHER FIND** no entitlement of benefits for petitioners that are afforded those teaching staff members for which benefits have been negotiated by the FEA, with the exception of those afforded by statute.

Since the respondent Board has prevailed herein, **I FIND** no compelling reason to address the issue as to whether the Petition is time-barred.

I CONCLUDE, therefore, that summary decision is **GRANTED** the Board and **DENIED** petitioners. The Board is however **ORDERED** to grant petitioners statutory benefits, such as sick days, forthwith. The Petition is otherwise **DISMISSED**.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

27 March 1986
DATE

Ward R. Young
WARD R. YOUNG, ALJ

APR 1 1986
Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1986
DATE

Ronald L. Parks/ts
FOR OFFICE OF ADMINISTRATIVE LAW

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DIANE VELDRAN ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF FRANKLIN, SUSSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Commissioner adopts the initial decision for the reasons stated therein. Further, he cautions the Board that source of funding cannot be used to differentiate among teaching staff members. (Spiewak, supra) The Commissioner recommends that any issue related to petitioners' exclusion from the negotiated agreement between the Franklin Education Association and the Board should be referred to the Public Employment Relations Commission.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO.EDU 5357-85

AGENCY DKT. NO. 257-7/85

MIDDLESEX COUNTY
VOCATIONAL AND TECHNICAL
HIGH SCHOOL TEACHERS ASSOCIATION,
Petitioner,

v.

BOARD OF EDUCATION
OF THE MIDDLESEX COUNTY
VOCATIONAL AND TECHNICAL
HIGH SCHOOLS,
Respondent.

Ezra D. Rosenberg, Esq., for petitioner (Katzenbach, Gildea & Rudner, attorneys)

Anthony B. Vignuolo, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: **January 27, 1986** Decided: April 2, 1986

BEFORE **RICHARD J. MURPHY**, ALJ:

This is an appeal by the petitioner, Middlesex County Vocational and Technical High School Teachers Association, from the action of the respondent, Board of Education of the Middlesex County Vocational and Technical High Schools, in barring federally funded "Chapter I" teaching staff members from serving as substitute teachers at local expense in unassigned periods on the same basis as other teaching staff members. The question presented is whether the respondent board's action in not allowing Chapter I

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teachers to substitute teach is consistent with the pertinent statutory and regulatory provisions and case law, as well as the bargaining agreement. This opinion concludes that Chapter I teachers are not precluded from substitute teaching at local expense and that the action of the respondent Board should be reversed.

PROCEDURAL HISTORY

Petitioner filed a verified complaint under N.J.S.A. 18A-6.9 on July 25, 1985, which was answered by respondent on August 13, 1985, and the matter was transmitted to the Office of Administrative Law as a contested case on August 20, 1985. A prehearing conference was conducted on October 21, and a briefing schedule established for summary decision motions which were submitted by the petitioner and respondent on December 4 and 20, 1985, respectively. Petitioner replied on December 30, 1985, and respondent replied to that on January 3, 1986. Oral argument was requested and denied based on the adequacy of the written submissions and the record was closed on January 27, 1986, with the final correspondence from the parties.

FINDINGS OF FACT

The following facts are not in dispute:

1. That the Middlesex County Vocational and Technical High School Teachers Association is the certified representative for all day school teachers within the respondent district, including "Chapter I" basic skills improvement ("BSI") teachers.

2. That an agreement between the respondent and the petitioner covering the period of July 1, 1984 through June 30, 1987, provides in pertinent part that:

> Teachers with unassigned teaching periods or other assigned nonteaching duties may be assigned to substitute for absent teachers at the discretion of the school principal. For each entire 45-minute period so assigned and duties performed, the teacher shall be paid $9.50. . . .

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> The school principals shall make reasonable efforts to make assignments of substitutes by giving preferences for selection to teachers with an unassigned period rather than teachers on a preparation period. . . . (Article VII(O)) (emphasis added).

3. That, on or about May 7, 1985, certain Chapter I teaching staff members within the respondent district requested that they be considered for such substitute duty. This request was denied by the respondent, who advised that Chapter I teaching staff members were precluded from such substitute duties by the "Guidelines for Development of Application for Basic Skills Improvement Program," as adopted by the New Jersey State Department of Education.

There is no dispute as to the above facts and I so **FIND.**

ARGUMENTS OF THE PARTIES

The petitioner argues that the above bargaining agreement covers federally funded Chapter I teachers and entitles them to be assigned to substitute for absent teachers and makes no provision excepting such teachers from the contractual benefit of serving as substitutes. Petitioner cites Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982) for the proposition that the source of funding may not be used as a basis for discriminating among teachers and that this holding should be extended in this instance to the non-statutory benefit of substitute teaching controlled by the collective bargaining agreement. Petitioner also contends that no federal statute or regulation requires a different result, so long as the local educational agency uses its own funds and not federal monies to pay Chapter I teachers to serve as substitutes for non-Chapter I teachers. Citing case law requiring that Chapter I teachers not be discriminated against on the basis of a funding source and the absence of any federal prohibition on Chapter I teachers serving as substitutes, the petitioner argues that the bargaining agreement controls.

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Respondent counters and claims that the use of Chapter I teachers is restricted to Chapter I purposes by federal and state regulation, the purpose of which is to "prohibit an abuse of federal money solicited for Chapter I purposes. . ." (Brief at p. 3). Respondent cited in particular a federal regulation in 49 Fed. Reg. 3198 (1984), which states that "Chapter I staff may not be assigned substitute teaching of non-Chapter I class or regular supervision of a homeroom." Respondent further cites what it calls a "regulation" promulgated by the Department of Education pertaining to the basic skills improvement programs (Chapter I), providing as follows:

> Substitutes - Basic Skills Improvement Program staff may not be used to serve as substitutes for district personnel funded by local resources and state equalization aid. However, BSI funds may be used to provide substitutes for BSI funded staff. (Emphasis added.)

Under these "regulations," respondent claims that Chapter I teachers are expressly precluded from substitute teaching and that the Board would risk loss of federal funds by any violation of this federal and state policy. Spiewak is inapposite, respondent contends, because the collective bargaining agreement in this instance is preempted by federal and state regulation and is therefore illegal and unenforceable. Respondent also argues that Spiewak concerns "benefits" such as sick leave, and does not include assigned substitute duties which are not automatic contractual benefits but rather separate job assignments.

Petitioner takes vigorous exception to this analysis by first arguing that the federal regulation cited does not exist. Rather, petitioner contends that the regulation in question has been proposed but not adopted. In particular, 34 C.F.R. § 204.22, 49 Fed. Reg. 3198, if adopted, would provide that:

> An agency that receives Chapter I funds may assign personnel paid entirely with Chapter I funds to supervisory duties that provide some benefit to children not participating in the Chapter I project, if
>
> 1. These duties are limited, rotating and supervisory;
>
> 2. Personnel with functions similar to those of the Chapter I personnel, but who are not paid with Chapter I funds, are assigned to these duties at the same school site;
>
> 3. These duties do not include substitute teaching of a non-Chapter I class or regular supervision of a homeroom;
>
> 4. The Chapter I personnel do not perform any duties for pay that non-Chapter I personnel perform without pay; and

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5. The proportion of total work time that Chapter I personnel at the same school site spend performing these duties does not exceed the lesser of either

   (i) the proportion of total work time that non-Chapter I personnel spend performing these duties, or

   (ii) ten percent of the Chapter I person's total working time. (Emphasis added.)

The proposed regulation (petitioner's exhibit A) further cites as examples of duties that might meet these conditions as including hall duty, lunchroom supervision, playground supervision, and other tasks commonly shared among the staff at school. In addition to arguing that this proposed regulation has not been adopted, petitioner argues that nothing in it nor in the controlling statute, prohibits respondent from carrying out its bargaining agreement by allowing Chapter I teachers to substitute, provided that they are compensated with local as opposed to federal funds. Petitioner cites the Education Consolidation and Improvement Act (ECIA, P.L. 98-211 as amended) and claims that it does not expressly prohibit the use of Chapter I teachers as non-Chapter I substitute teachers and contemplates their use in non-Chapter I assignments. That section provides:

> Public school personnel paid entirely by funds made available under this subchapter may be assigned limited, rotating, supervisory duties which are assigned to similarly situated personnel who are not paid with such funds, and such duties need not be limited to classroom instruction or to the benefit of children participating in programs or projects funded under this subchapter. Such duties may not exceed the same proportion of total time as is the case with similarly situated personnel at the same school site, or ten percent of the total time, whichever is less. (Emphasis added.) See, 20 U.S.C.A. § 3805(d)(10).

With respect to the proposed regulation, which would augment the statute, petitioner argues that it does not prohibit a school district from agreeing to use its own funds to pay Chapter I teachers to perform additional duties, to which they are entitled by agreement under state case law. Petitioner also argues that the current state guidelines do not preclude the use of local funds to compensate Chapter I teachers for teaching non-Chapter I students.

Conceding that the federal regulation cited has been proposed but not adopted, respondent continues to maintain that it would risk loss of federal funding if it allowed Chapter I teachers to substitute at local expense. Additionally, respondent notes that the

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Chapter I teachers were hired pursuant to a federally funded program and for no other purpose and that neither the collective bargaining agreement nor regulation requires the Board to utilize its own funds to pay Chapter I teachers to substitute. Spiewak, respondent continues to claim, is "totally inapplicable" to the facts at hand because of the federal regulations which are in effect and controlling. In the alternative, respondent requests that this matter consider the effect that adoption of these proposed regulations would have on the petitioner's request for a leave.

DISCUSSION AND CONCLUSION OF LAW

The question presented is whether the action of the respondent Board in refusing to allow Chapter I teaching staff members to substitute at local expense in unassigned periods was consistent with the pertinent provisions of the statutory, regulatory and case law, as well as the terms of the bargaining agreement. I **CONCLUDE** that it was not for the reasons set forth below and should be reversed.

As to the current status of the proposed amendment which has been argued to preclude such substitute teaching, there is no indication that this has been adopted to date. See, 30 C.F.R. § 204.22.[1] Under 34 C.F.R. § 200.55, the current regulation (and this opinion will be limited to that, notwithstanding the pendency of the proposal), the allowable cause section provides:

> An LEA [local educational association] may use Chapter I funds only to meet the cost of project activities that —
>
> (a)(1) are designed to meet the specific educational needs of educationally deprived children identified under section 556(b)(2) of Chapter I;

---

[1] After checking the customary low-tech and high-tech research devices, I had a law clerk call the U.S. Department of Education on this point and she was advised by Mr. James Spillane, Director of the Division of Program Support of the Compensatory Education program that 34 C.F.R. § 204.22 had not been adopted as of March 13 and that the current adopted provision concerning allowable cost is still 34 C.F.R. § 200.55.

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> (a)(2) are included in an application provided by an SEA [state educational agency] under § 200.14; and
>
> (a)(3) comply with all applicable Chapter I requirements including the assurances required under section 556(b) of Chapter I.

Referring back to the statute, it is first noted that Chapter 51 concerns authorized elementary and secondary education block grants, and specifically, in subchapter 1, financial assistance to meet the special needs of disadvantaged children. The declaration of policy behind that act stated that Congress intended to continue to provide financial assistance and wanted to do so in a manner that would free the schools from unnecessary federal supervision, direction and control, and in particular, that:

> Federal assistance for this purpose would be more effective if education officials, principals, teachers and supporting personnel are freed from overly prescriptive of regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program. [20 U.S.C.A. § 3801.]

The following sections of the act concern authorized programs and the various uses for federal funds to meet the special educational needs of educationally deprived children. Although the approval of grant applications is subject to a number of assurances with respect to program integrity and purpose, local educational agencies are left discretion to make educational decisions consistent with achieving the purposes of the subchapter as set forth in 20 U.S.C.A. § 3805(d).

The particular section of interest, as noted by petitioner, provides that "public school personnel paid entirely by funds made available under this subchapter may be assigned limited, rotating, supervisory duties which are assigned to similarly situated personnel who are not paid with such funds, and such duties need not be limited to classroom instruction or to the benefit of children participating in programs or projects funded of this subchapter." 20 U.S.C.A. § 3805(d)(10). The regulation also makes clear that such duties may not exceed the same proportion of total time as is the case with similarly situated personnel at the same school site or ten percent of the total time, whichever is less. Thus, the statute contains a limited authorization for LEA's to use Chapter I-compensated teachers to perform certain limited duties assigned to other teachers not paid with such funds. This limited authorization for use of Chapter I personnel, and, indirectly, of federal funds for non-Chapter I purposes, does not include

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any specific allowance for substitute teaching of non-Chapter I students. Nor does the current regulation, 34 C.F.R. § 200.55, allow Chapter I federal funds to be used for substitute teaching.

Neither the current statute nor regulation, however, specifically address the issue of whether Chapter I teachers may be used as substitutes if they are compensated for this purpose with local funds only.[2] Although the statute does not expressly authorize the use of Chapter I teachers to substitute with local funds, it also does not preclude this practice and recognizes that LEA's should be left some discretion, provided it does not result in abuse of funds or other results contrary to the objectives of the Chapter.[3] Concern with misuse of federal funds, which is at the heart of the concept of allowable cost in the regulation, is not present in a situation where local funds are to be utilized pursuant to a bargaining agreement. In the absence of any clear and express prohibition, such a limitation on the use of personnel, as opposed to the use of federal funds, should not be inferred in that it may unduly interfere with local discretion, contrary to the federal intent.

Accordingly, I **CONCLUDE** that there is no prohibition currently contained in the applicable federal statute and regulation which would prohibit the use of Chapter I teachers as substitute teachers, provided that they are compensated for this with local funds and further provided that their assignment to substitute duties should not otherwise interfere with the discharge of their Chapter I responsibilities.

Respondent also cites the state guideline for development of application of the basic skills program issued for the fiscal year 1986, which is essentially a guide to local school districts to assist them in preparing basic skills improvement program applications under the Education Consolidation and Improvement Act (ECIA). These guidelines

---

[2] The proposed regulation, 34 C.F.R. § 204.22, may also be open to some interpretation, as petitioner suggests, as to whether it precludes Chapter I teachers from substitute teaching if they are compensated by local funds, provided that the purposes of the Chapter I program are not undercut by teachers being assigned substitute duties.

[3] It is significant to note, as petitioner suggests, that some use of federal funds for incidental duties is allowed, which demonstrates that Congress was sensitive to the realities of the burdens and demands on teachers and the school systems and sought to allow some reasonable accommodation.

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provide, as stated before, that the BSI staff may not be used to serve as substitutes funded by local resources but that BSI funds can provide substitutes for BSI (Chapter I) staff. These guidelines have no authority or effect beyond the federal enabling act and regulation. They express, consistent with federal law, the overriding concern with protection of federal funds to expenses which should be borne by local resources. They may be read fairly only to protect against that threat, and do not clearly address the issue of whether Chapter I teachers may substitute if they are paid to do so by local funds. I **CONCLUDE**, therefore, that the state guidelines first do not expressly prohibit the use of Chapter I staff for substitute teaching if funded by local resources and, second, that they are based solely on the governing federal statutes and regulations and may not be used to impose restrictions which are not provided for or are not consistent with them.

Having concluded that neither the federal nor state law precludes Chapter I teachers from substituting if compensated by local funds, provided that these assignments do not otherwise interfere with Chapter I duties, I also **CONCLUDE** that under the principles enunciated in Spiewak, the bargaining agreement should govern in this instance and Chapter I teachers are entitled to protection under it as to substitute teaching provision.

DISPOSITION

On the basis of the above findings of fact, arguments and conclusions of law, it is **ORDERED** that the action of the respondent Board of Education in declining to permit substitute teaching by Chapter I teachers with local funds is reversed and the relief requested by the petitioner granted.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 7, 1986
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

APR - 4 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 7 1986
DATE

Ronald J. Parke/ts
OFFICE OF ADMINISTRATIVE LAW

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MIDDLESEX COUNTY VOCATIONAL AND TECHNICAL HIGH SCHOOL TEACHERS ASSOCIATION,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MIDDLESEX COUNTY VOCATIONAL AND TECHNICAL HIGH SCHOOLS,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law. No exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

Having reviewed those recommended findings and conclusions set forth in the initial decision, the Commissioner hereby affirms them as his own, specifically for the reason stated by the ALJ on page 8 of the initial decision which reads as follows:

> ***[T]here is no prohibition currently contained in the applicable federal statute and regulation which would prohibit the use of Chapter I teachers as substitute teachers, provided that they are compensated for this with local funds and further provided that their assignment to substitute duties should not otherwise interfere with the discharge of their Chapter I responsibilities.*** (emphasis added)

It is noted that the Board relies on that portion of the State guidelines cited in the initial decision, ante, as the basis for which it determined to deny Chapter I teachers periodic substitute teaching assignments pursuant to its existing negotiated agreement with petitioner.

The Commissioner has requested and received further clarification regarding the implementation of the State guidelines in question from the department's managing director of compensatory education programs.

Based upon such information, the Commissioner is satisfied that these guidelines are not intended to exclude Chapter I teachers from periodically serving as substitute teachers within the regular program, provided that such service rendered by Chapter I teachers in this capacity is locally funded and that the amount of time

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devoted to substitute teaching by Chapter I teachers does not interfere with their primary compensatory teaching duties as required by federal law and regulations.

The Commissioner directs, however, that the current State guidelines be clarified to avoid any undue confusion by local boards of education regarding the temporary assignment of Chapter I teachers as substitute teachers in non-Chapter I positions in a manner consistent with this decision.

Accordingly, the Board's action complained of by petitioner herein is set aside and summary judgment is entered on petitioner's behalf.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 16, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 6857-85

AGENCY DKT. NO. 364-10/85

B.C., ON HIS OWN BEHALF AND ON BEHALF OF HIS MINOR SON, C.C.,

Petitioner,

v.

CUMBERLAND REGIONAL SCHOOL DISTRICT BOARD OF EDUCATION and NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION,

Respondents.

John T. Barbour, Esq., for petitioner (Barbour & Costa, attorneys)

William P. Doherty, Jr., Esq., for respondent, Cumberland Regional School District Board of Education

Michael J. Herbert, Esq., for respondent, New Jersey State Interscholastic Athletic Association (Sterns, Herbert & Weinroth, attorneys)

Record Closed: February 20, 1986 Decided: April 3, 1986

BEFORE BRUCE R. CAMPBELL, ALJ:

B.C. (petitioner) filed a petition of appeal with the Commissioner of Education on his own behalf and on behalf of his minor son, C.C., on October 21, 1985. The petition alleges that the Board discriminated against C.C. on the basis of his sex by removing him from the Cumberland Regional High School field hockey team. The petition asks an order of the Commissioner:

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1. temporarily and permanently reinstating C.C. as a member of the Cumberland Regional High School field hockey team;

2. directing special training and coaching for C.C. to compensate for the time lost because of exclusion;

3. awarding monetary damages both in a compensatory and punitive amount;

4. awarding costs of bringing the action, including reasonable attorney's fees;

5. awarding other relief the Commissioner deems appropriate; and

6. enjoining the New Jersey State Interscholastic Athletic Association (NJSIAA or Association) from further interference with C.C.'s exercise of his rights.

Because the petition contained a request for emergent relief, the matter was transmitted on an expedited basis to the Office of Administrative Law on October 29, 1985, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. Oral argument on the motion for interim relief and stay of Board action was heard on November 4, 1985, at the Office of Administrative Law, Trenton. The motion was denied and an order issued on November 6, 1985. The order also directed that plenary hearing go forward on January 13 and 14, 1986. The matter was heard at that time. Counsel timely filed posthearing submissions and the record closed on February 20, 1986.

I.

Certain facts are not contested and reveal the context of the case. C.C. is in the tenth grade at Cumberland Regional High School. The high school sponsors nine interscholastic sports for boys, seven interscholastic sports for girls and two interscholastic sports on a coeducational basis. There is a field hockey team for girls. There is not a field hockey team for boys.

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In 1984, C.C. was a member of and participated in the interscholastic field hockey team. In the spring of 1985, the NJSIAA conducted a study and produced a monograph concerning the participation of males on female athletic teams. During the conduct of the study, the NJSIAA maintained communication with the Office of Equal Educational Opportunity (OEEO) in the New Jersey Department of Education. On April 15, 1985, the NJSIAA Executive Committee adopted a resolution concerning guidelines governing girls' athletic programs. The material part of the resolution states:

> 1. Males shall be excluded from female athletic teams although there are no teams for boys in the same sport until such time as both sexes are afforded overall equal athletic opportunity.
>
> 2. A member school has the discretion to exclude participation in contact sports on the basis of gender where it can substantiate that its overall sports program does not limit athletic opportunities to girls.
>
> 3. Female athletes are not entitled to participate on boys' teams where there are girls' teams in the sport, and be it further,
>
> **RESOLVED** that these guidelines will be transmitted to the Commissioner of Education for his review and approval pursuant to N.J.S.A. 18A:11-5, and shall not be effective until approval is granted by the Commissioner of Education.

A statement of purposes is attached to the resolution. The statement sets forth that the purpose of the resolution is to provide consistent statewide guidelines for member schools in dealing with separate but interrelated issues involving girls' interscholastic sports. The statement says that the resolution is consistent with existing federal and state law. The statement goes on to explain the purposes of each of the three sections.

When the district allowed C.C. to participate in the 1984 season, that was the first instance of a boy participating on a girls' team. It was a freshman sport and was not covered by NJSIAA rules. The district informed the Cape-Atlantic League, to which it

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belonged, that it had a male on the field hockey team and would allow him to play as long as qualified. A copy of the notice to the League was sent to the Commissioner of Education. No response was received from the Commissioner.

Subsequently, the school learned that the NJSIAA was considering the resolution set forth above. There were then communications between the school district and the NJSIAA. On October 29, 1985, the Director of the NJSIAA informed the district that the Commissioner of Education had not acted upon the guidelines. NJSIAA had adopted the guidelines effective April 15, 1985.

The Assistant Commissioner of Education for County and Regional Services wrote to the NJSIAA on September 3, 1985, stating, among other things, that the Department of Education was in agreement with parts one and three of the resolution, but was not officially acting on the resolution.

II.
RELEVANT EVIDENCE

The petitioner called the Executive Director of the Massachusetts Interscholastic Athletic Association. He stated that in approximately 1979, boys in Massachusetts began to participate in girls' soccer, volleyball, field hockey, swimming and softball. This participation was based on a decision of the Massachusetts Supreme Judicial Court which, in turn, was based on the Equal Rights Amendment that then was part of the Massachusetts State Constitution. The association adopted the point of view that if a school had only a girls' team in a given sport, boys were to be allowed to participate.

The director expressed the opinion that in each case in which a boy played, a girl was displaced. In the 1985 field hockey season, five senior boys were on the Northhampton field hockey team. It was the director's opinion that their presence on the Northhampton team intimidated opponents. The director also stated that when a girl tries out for a boys' team, she and her parents go in "with eyes open." When a boy or boys are placed on a girls' team, all opponents are put to an unfair choice. They do not expect to compete against boys. They must either compete against boys or forfeit. The director also stated that there were no high school field hockey teams for males in Massachusetts.

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The Massachusetts Association has a standing Sports-Medical Committee. Six or seven physicians on this committee are also members of the Massachusetts Medical Society. Both groups oppose boys' participation on girls' teams. In considering the number of boys on girls' teams throughout the state, the number seems small. The impact, however, is disproportionate. Effects are felt by all teams in a league and in tournaments.

A male field hockey player who is also a coach and official and an International Grade I umpire testified. He is one of only 22 persons in the world qualifed to officiate at World Cup and Olympic contests.

He explained that bodily contact is prohibited in field hockey. It is monitored carefully by officials and players can be ejected for egregious or continued contact. Even playing the ball in a dangerous manner can be the basis for a foul. A player may not interfere with another player's person or stick. No obstruction is allowed. Field hockey is a noncontact sport, although incidental contact may occur.

There is only one international field hockey federation. The United Kingdom and the United States have separate federations. All federations use the same set of rules. Men in the United States play by international rules. Field hockey clubs in the United States also play by international rules. The National Collegiate Athletic Association plays under its own set of rules. High schools play under a modified version of the international rules. School play allows substitution so as to promote participation of more persons.

The size and speed of a player in field hockey does not affect the safety of other persons. There is a range of sizes on any team. Agility and fitness are far more important than size and speed. The size and weight of the hockey stick are limited. As in golf, the hardness of a hit depends on timing more than strength.

Mixed hockey is played throughout the world. In England, a mixed team may have no more than six (out of 11) males on the field at one time. The witness also stated that the United States Field Hockey Association holds an annual festival which includes mixed-team play. At the Olympic and World Cup levels, however, men and women play separately. The National Collegiate Athletic Association does not sanction mixed play.

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C.C. testified that he is intensely interested in field hockey and wants to continue to play the game. Aside from the Cumberland High School team, there is no other team in the area. He would have to travel to New York City or its environs in order to play on weekends.

C.C. played on the East Coast Team as a member of the Garden State Team. He and one other player were of high school age, all others were college students. In addition to the Garden State Games, he has played in the National Sports Festival.

If allowed to participate on the high school team, he will have five or six practices every week and play in 20-25 games per season. If he plays only on the East Team, he must pay for his own equipment and travel. In both 1984 and 1985, he was the only male who came out for the Cumberland team. After being advised that he could not play, he served as team manager this year. C.C. aspires to Olympic play.

A college-level male field hockey player testified. He has played in the Northeast Field Hockey Association league. He has organized and played in a mixed league in the Moorestown area. He sees no problems with mixed teams. Rules forbid body contact. The obstruction rule minimizes contact. There is a national men's team. The National Sports Festival is, in effect, an Olympic team farm system. National Sports Festival teams are segregated teams because Olympic play is segregated.

The witness saw no health or safety problems in mixed play that do not exist in segregated play. The witness also gave information about club and association field hockey play in the eastern United States.

The varsity field hockey coach at Cumberland Regional High School testified. She has held that position for six years. She was junior varsity coach for three years prior to that. She played field hockey in junior high school, high school and college. She has also played seven years on a club team.

Although there has been a decline in the number of girls coming out for the sport, the witness in no way attributes this to the presence of C.C. on her team. Sending districts have dropped field hockey programs and this, in turn, has lessened interest in the sport.

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The coach also stated that she observed no problems between C.C. and other players. Female players did not back off from C.C. She could see no health or safety problems related to his play. There were girls on the team last year who ran faster than C.C. One or possibly two girls had greater endurance than he and one girl definitely hit harder than he. Skill is related to size and speed, but size and speed do not control. In terms of stick technique, C.C. was considerably less proficient than many girls. In the 1985 season, her team suffered some seven or eight injuries. This is high in comparison to other years. The injuries occurred while C.C. was not an active player. C.C. probably would have made the varsity team this year. He probably would have been in the starting lineup. Three sophomores did win starting positions this year. The witness iterated that finesse is much more important than "hit and run" in the play of field hockey. She also stated that the average girl who might try out for field hockey would not likely be intimidated by a male player.

The field hockey coach at Hopewell Valley Regional Central High School also testified. She has been involved in health and physical education for 18 years. She has served as a field hockey coach for 18 years and has been quite successful. Based on her observations, boys are stronger, quicker and hit harder. In her opinion, boys should not play on girls' teams at the interscholastic level.

The Director of Athletics at Hopewell Valley also testified. He has taught field hockey in regular gym classes on a coeducational basis. He has experience running the Mercer County field hockey tournament, although he has never coached the sport or played it at any level. He also expressed an opinion against boys participating on girls' field hockey teams.

The Executive Director of the NJSIAA testified. The NJSIAA is a voluntary association of 441 members. Three hundred sixty-five members are public school districts and the balance are parochial and private schools. The association sponsors 17 state championships for boys' sports and 16 state championships for girls' sports. Its Constitution, Bylaws, and Rules and Regulations (RA-6) list sports sanctioned by the Association. Rule 7 (at 72) makes the official high school field hockey rules applicable to all field hockey play in the state. The association has a field hockey committee comprised of approximately seven female members.

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There is no legal requirement for a board of education to establish any sport. Some schools offer only two or three; some schools, as many as 23. Cumberland Regional and Hopewell Valley are on the high side as to offerings.

Exhibit RA-16, a New Jersey sports program update dated September 1985, measures the growth or decline in sports in the state. This information is supplied to OEEO to help them with their duties. While the Massachusetts director stated that the figures in his state are very stable, in New Jersey they have changed dramatically. Participation by girls has risen 174 percent while total enrollment was declining.

The NJSIAA has worked with OEEO over a long period. They put out a question-and-answer booklet on the development of sports. Conferences were restructured in 1979 and 1980 to help place inner city and parochial schools in new conferences. Many inner-city school districts, because of many new league and conference formations, have established girls' sports. Since 1967, NJSIAA has employed a staff person for girls' athletics, sponsored state championships and issued guidelines.

In the fall of 1984, the Association began to receive inquiries and protests from Cape-Atlantic League teams concerning C.C. participating on the Cumberland field hockey junior varsity team. Because the Association's regular update process was too slow, the Association directed its counsel to come up with a response. The March 1985 monograph earlier mentioned was a result of that effort. This led to the resolution of April 15.

The final draft of the resolution was shared with OEEO and that office expressed no basic disagreement. Prior to April 15, it was sent to all executive committee members. On April 15, it was adopted by the executive committee.

On July 8, the Association's counsel wrote to the Director of the Division of Controversies and Disputes in the Department of Education concerning the resolution. The letter discusses the necessity for some kind of policy concerning the exclusion of boys from girls' teams. (RA-2). On August 6, counsel again wrote to the director, noting that the resolution was contingent on the subsequent approval of the Commissioner because the Commissioner has jurisdiction to deal with equal educational opportunities. The letter suggests an urgent necessity for a review of the guidelines by the Commissioner and an approval, rejection or modification prior to the fall sports season (RA-3).

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On September 3, the Assistant Commissioner for County and Regional Services wrote to the Association agreeing with sections one and three, but expressing doubt that section two was in conformity with N.J.A.C. 6:4-1.5(f). The letter also states, "While we are aware that federal regulations permit the exclusion of participation on the basis of gender in sports designated as contact sports, New Jersey regulations do not make that distinction and the Attorney General in a formal opinion to the Department of Education in 1975 makes that point clear." (RA-4.)

On August 29, the Director had sent a letter to the principal of Cumberland Regional High School enclosing a copy of the resolution and advising that, even though the Commissioner had not acted on the resolution, the Association expected such action soon and that Cumberland should consider it operative. Therefore, no male student should be allowed to participate in any girls' program (RA-9).

When asked how the Association determines if discrimination exists as to the opportunity for females at a given school, the Director replied that the Association relies on the September 1, 1978 athletic guidelines issued by OEEO (RA-10). Question and answer number eight in that memorandum read as follows:

> Q. If a school sponsors a team in a particular sport for one sex but no similar team is provided for members of the opposite sex, must the excluded sex be allowed to try out for that team?
>
> A. If overall athletic opportunities are limited for either sex (in many cases, this will apply to females), then the sex having limited opportunities must be allowed to try out for that team. (Refer to question #4 which details how a school evaluates overall athletic opportunities.)
>
> If overall athletic opportunities are not limited for one sex (very often males), the school is not required to permit the excluded sex to try out. For example, if a school provides gymnastics for girls and no such team for boys, the school is not required to permit boys to try out if their overall athletic opportunities are not limited.
>
> If it can be shown that neither sex has limited opportunities, the school may establish its own policy as to whether students of one sex may try out for teams established for members of the opposite sex.

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This witness also stated that even though the superintendent of the Cumberland District stated that athletic opportunities were equal for boys and girls, he believes males have greater athletic opportunities than females. The witness also acknowledged that there is no present field hockey opportunity for C.C.

The NJSIAA sought Commissioner of Education approval of its resolution under N.J.S.A. 18A:11-5. The Director assumes OEEO was seeking similar approval under N.J.A.C. 6:4-1.5. The NJSIAA has no studies or documentary evidence of health or safety problems based on male participation on predominantly female teams.

III.
PETITIONER'S ARGUMENTS

The petitioner maintains that the philosophical debate is over. It was conducted by the State Legislature. N.J.S.A. 18A:36-20 and N.J.S.A. 10:5-1 guarantee the exercise of rights C.C. wants to exercise. Courts are not free to read unwarranted meanings into an unambiguous statute even to subserve a supposedly desirable policy not effectuated by the act as written. Remedial Educ. and Diag. v. Essex Cty. Educ. Serv. Comm'n, 191 N.J. Super. 524 (App. Div. 1983).

C.C. has been denied the opportunity to participate as a member of the one field hockey team that exists at the school. The district is willing to allow him to participate as a member of the team. His parents want him to participate as a member of the team. His coach is willing to allow him to participate and no objections were presented at hearing from any potential teammates. The only reason C.C. is being excluded is because he is male. It is stipulated that his exclusion on that basis occurred at the direction of the NJSIAA. The law of this State is clear in this case. N.J.S.A. 18A:36-20, cited above, reads as follows:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin.

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Furthermore, the Legislature has enacted statutes of general application that expressly ban discrimination on the basis of sex. N.J.S.A. 10:5-1 et seq., cited above, provide in part:

> N.J.S.A. 10:5-2. Police power, enactment deemed exercise of
> The enactment hereof shall be deemed an exercise of the police power of the State for the protection of the public safety, health and morals and to promote the general welfare and in fulfillment of the provisions of the Constitution of this State guaranteeing civil rights.
>
> N.J.S.A. 10:5-3. Finding and declaration of legislature
> The Legislature finds and declares that practices of discrimination against any of its inhabitants, because of race, creed, color, national origin, ancestry, age, sex, marital status, liability for service in the Armed Forces of the United States, or nationality, are a matter of concern to the government of the State, and that such discrimination threatens not only the rights and proper privileges of the inhabitants of the State but menaces the institutions and foundation of a free democratic State; provided, however, that nothing in this expression of policy prevents the making of legitimate distinctions between citizens and aliens when required by Federal law or otherwise necessary to promote the national interest.
>
> The Legislature further declares its opposition to such practices of discrimination when directed against any person by reason of the race, creed, color, national origin, ancestry, age, sex, marital status, liability for service in Armed Forces of the United States, or nationality of that person or that person's spouse, partners, members, stockholders, directors, officers, managers, superin-tendents, agents, employees, business associates, suppliers, or customers, in order that the economic prosperity and general welfare of the inhabitants of the State may be protected and insured.
>
> N.J.S.A. 10:5-4. Obtaining employment, accommodations and privileges without discrimination; civil right
> All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities, and privileges of any place of public accommodation, publicly assisted housing accomodation, and other real property without discrimination because of race, creed, color, national origin, ancestry, age, marital status or sex, subject only to conditions and limitations applicable alike to all persons. This opportunity is recognized as and declared to be a civil right.

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N.J.S.A. 10:5-5. Definitions
As used in this act, unless a different meaning clearly appears from the context:

. . . .

1. "A place of public accommodation" shall include, but not be limited to: . . . any kindergarten, primary and secondary school, trade or business school, high school, academy, college and university, or any educational institution under the supervision of the State Board of Education, or the Commissioner of Education of the State of New Jersey.

N.J.S.A. 10:5-12. Unlawful employment practice or unlawful discrimination
It shall be an unlawful employment practice, or, as the case may be, an unlawful discrimination:

. . . .

f. For any owner, lessee, proprietor, manager, superintendent, agent, or employee of any place of public accommodation directly or indirectly to refuse, withhold from or deny to any person any of the accommodations, advantages, facilities or privileges thereof, or to discriminate against any person in the furnishing thereof, or directly or indirectly . . . on account of the race, creed, color, national origin, ancestry, marital status, sex or nationality of such person, or that the patronage or custom thereat of any person of any particular race, creed, color, national origin, ancestry, marital status, sex or nationality is unwelcome, objectionable or not acceptable, desired or solicited.

"[A]n administrative officer is a creature of legislation who must act only within the bounds of the authority delegated to him." Elizabeth Federal S. & L. Assn v. Howell, 24 N.J. 488, 499 (1957). Where there exists reasonable doubt as to whether such power is vested in the administrative body, the power is denied. Swede v. City of Clifton, 22 N.J. 303, 312 (1956). Therefore, this tribunal is bound by the express, clear and unambiguous provisions of N.J.S.A. 18A:36-20 and N.J.S.A. 10:5-1 et seq. Those statutes prohibit discrimination that is based on sex.

In construing the interrelationship of N.J.S.A. 18A:36-20 and N.J.S.A. 10:5-1 et seq., the New Jersey Supreme Court in Hinfey v. Matawan Reg'l Bd. of Ed., 77 N.J. 514, 523 (1978) held:

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> Public schools and public education assuredly are covered by the anti-discrimination law. Public schools under the supervision of the Commissioner of Education are specifically "[a] place of public accommodation" under the Law Against Discrimination. N.J.S.A 10:5-5; Jenkins v. Morris Twp. School Dist. and Bd. of Ed., 58 N.J. 483, 496 (1971). A place of public accommodation is forbidden to discriminate invidiously in the offering of any of its "advantages, facilities . . . [or] privileges . . .." N.J.S.A. 10:5-4. Given the primary responsibility of the public school for education under the school laws, it is almost tautological to say that educational programs, courses of study and curricula form the core of this responsibility. Cf. Dunellen Bd. of Ed. v. Dunellen Ed. Ass'n., 64 N.J. 17, 26, 30 (1973). Hence, it is undeniable that a public school curriculum is one of the "advantages, facilities . . . [or] privileges" of a public school as a place of public accommodation. See Patterson v. Board of Ed., 11 N.J. Misc. 179 (Sup. Ct. 1933) aff'd o.b. 112 N.J.L. 99 (E. & A. 1934); cf. Fraser v. Robin Dee Day Camp, 44 N.J. 480 (1965); See also Brown v. Board of Ed., 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954).

Furthermore, the Appellate Division clearly established in Hinfey the purpose of N.J.S.A. 18A:36-20, referred to by that court as the 1973 statute:

> It is our view that the 1973 statute was intended, laudably and certainly within the Legislature's power to do so, simply to extend the constitutional bases of proscribed discrimination in respect of student opportunities to include sex. 147 N.J. Super. 201, 210 (App. Div. 1977).

In disputes concerning coaching, extracurricular assignments, and extra-classroom assignments, the Commissioner has consistently held that such are part of the total curriculum. Dallolio v. Vineland Bd. of Ed., 1965 S.L.D. 18. Furthermore, the Commissioner has noted that the existence of broad and well-developed student activities is an essential factor in the approval and accreditation of any secondary school. Boards are not only permitted under law, but have a duty and a responsibility to develop broad programs of pupil activities beyond formal classroom instruction. In Asbury Park Bd. of Ed. v. Asbury Park Ed. Ass'n, 145 N.J. Super. 495 (Ch. Div. 1976), aff'd in part, dismissed in part, 155 N.J. Super. 76 (App. Div. 1977), the court held that extracurricular activities are an integral part of a child's education and are incorporated into the duty to properly teach.

The petitioner also challenges the NJSIAA's claim that the resolution of April 15, 1985, was sufficient in and of itself to comprise a binding rule upon which C.C. could be denied the right to participate on Cumberland's interscholastic field hockey

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team. In the first place, no administrative rule that is at variance with a statute can be given effect. Second, any charter, constitution, bylaws and rules and regulations of an organization such as NJSIAA can at most be binding upon local boards of education if adopted in compliance with N.J.S.A. 18A:11-3, -4 and -5. In this case, the only expression of position by the Commissioner of Education in response to the resolution (RA-1) is in the record as RA-4, the letter of September 3, 1985 referred to above. In the second and last paragraphs of that letter, the Assistant Commissioner states:

> The Commissioner has long emphasized that policy development and rulemaking as it relates to interscholastic athletics is the responsibility of the NJSIAA with oversight authority vested by law in the Commissioner. We therefore do not deem it appropriate to make rules and establish policy through resolutions presented to the Commissioner for approval. Such a practice is not orderly, efficient or effectively instructive to your constituency or the Department of Education which must review actions of your association. All information required by association members in order to organize and carry out their interscholastic athletic programs should be available to them within the one volume of your regulations, constitution and bylaws, rather than scattered among a number of different sources.
>
> . . . .
>
> I hope that the guidance provided in this letter will assist you in developing appropriate rules and regulations for review by the Commissioner pursuant to N.J.S.A. 18A:11-5.

Therefore, in the petitioner's view, the proper procedure under the statutory scheme has not yet been exercised and the resolution does not constitute a binding rule or regulation at all. Further, there is no evidence in the record that the resolution was promulgated pursuant to the constitution and bylaws of the NJSIAA. Last, there has been no compliance with the Administrative Procedures Act, N.J.S.A. 52:14B-1 et seq. by either the NJSIAA or the Commissioner of Education with respect to the resolution. Therefore, it cannot constitute a binding rule.

The NJSIAA claims it relied on the September 1, 1978 document of the OEEO (RA-10). As set forth above, the answer to question eight in that document says, in part, "If it can be shown that neither sex has limited opportunities, the school may establish its own policy as to whether students of one sex may try out for teams established for members of the other sex."

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The NJSIAA claims that it relied upon this document in promulgating the resolution and in ordering Cumberland to remove C.C. from its interscholastic field hockey team. However, the testimony contains no factual basis for that claim. The testimony of the Director of NJSIAA was that he had not spoken to anyone from Cumberland regarding the overall athletic opportunities for males and females at that school until the day of hearing. The only other evidence in the record on this point are answers of NJSIAA (P-1) and Cumberland (P-2) to the interrogatories propounded on behalf of C.C. In response to interrogatory number five, which asks, "Do equal athletic opportunities exist for males and females at the Cumberland Regional School District?" the District answered yes. NJSIAA answered the same question by merely reciting the number of teams respectively available for males, females and both sexes. NJSIAA's response was attributed to the knowledge of the Director who admitted on cross-examination to having no specific personal knowledge or indeed really no knowledge at all upon which to base an answer to this question. For instance, the Director did not know the numbers of pupils of each sex involved in athletic programs at the school.

The State Department of Education, as far back as 1977, has expressly delegated to each local board of education the authority to permit, in circumstances such as those in the present case, students such as C.C. the opportunity to participate in an interscholastic athletic team. In the present case, Cumberland was, in fact, permitting C.C. to participate until the NJSIAA ordered that he be excluded. For all the foregoing reasons, judgment must be entered in favor of the petitioner.

IV.
RESPONDENTS' ARGUMENTS

The respondents assert that Congress adopted Title IX of the Education Amendments of 1972 (20 U.S.C. § 1681 et seq.) which, among other things, mandated that all educational institutions receiving federal assistance must provide equal educational opportunties without regard to sex. In 1977, OEEO collaborated with a number of agencies, including the NJSIAA, to develop athletic guidelines that were promulgated on September 1, 1978 (RA-10). All involved intended to advance opportunities for girls in extracurricular sports, in recognition that high school girls had not received equal opportunities in the past.

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Question eight has been set forth above. It emphasizes that the purpose of the guideline is to preserve opportunities for females and to redress the effects of past discrimination and disparate treatment relating to girls' athletics. The guidelines also express the opinion that if boys were permitted to participate on girls' teams, they could dominate the girls' programs which would further limit opportunities for girls, contrary to the intent of Congress and the Department of Education.

NJSIAA has demonstrated that, over the years, it has dramatically expanded athletic opportunities for girls among its 441 member schools. The Association has adopted appropriate rules and guidelines to preserve advances made in girls sports, most notably the April 15, 1985 resolution (RA-1). During a period of overall decline in school enrollments, girls' athletic programs have grown dramatically. The Director testified that his office began to receive complaints from Cape-Atlantic Conference teams concerning the presence of a male on Cumberland's field hockey junior varsity team. In addition, an athletic director from Vineland complained that if the situation were allowed to continue, he would recruit males for his field hockey team and have boys participate on the school's softball team, in each case displacing girls.

On February 1, 1985, OEEO convened a Special Task Force at NJSIAA headquarters to update the 1978 guidelines (RA-10). At that time, NJSIAA advised OEEO representatives of concerns about boys participating on girls' teams and related issues. When OEEO could not assure the NJSIAA that a definitive answer to all these issues would be forthcoming for a considerable period of time, the Director had the Association's legal staff prepare an appropriate response. As a result, a comprehensive legal monograph was submitted to the Association concluding, among other things, that males could be excluded from female athletic teams (RA-8). Based on this, a draft resolution was prepared and made known to OEEO at the next task force meeting on April 1. OEEO staff suggested certain changes which were made. The NJSIAA Executive Committee passed the amended version on April 15, 1985.

Although the resolution had been transmitted to the OEEO in early April 1985, formal transmission was made to Department of Education by letter to the Director of the Bureau of Controversies and Disputes on July 8 (RA-2). All NJSIAA member schools, including Cumberland, were advised of the resolution in April. In the fall and after Cumberland specifically inquired about playing a boy on its field hockey team, the

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Director advised the principal of that school on October 29, that by virtue of the resolution, C.C. could not continue to participate (RA-9). On September 3, an assistant commissioner responded to the NJSIAA stating that the Department essentially agreed with the prohibition of boys playing on girls' teams (RA-4).

The Director's testimony that coeducational teams in certain noncontact sports, such as swimming, were dominated by males until local conferences began to mandate separate swimming teams was persuasive. Also persuasive was the testimony of the Massachusetts director that while only 20 to 30 boys have participated on girls' teams in Massachusetts since the MIAA decision, above, their impact on the girls' sports has been highly detrimental.

This tribunal also should consider and give weight to the testimony of the girls' field hockey coach from Hopewell Valley Central. In her judgment, the risk of injury would be increased by the introduction of boys to field hockey teams.

The NJSIAA's prohibition on boys participating on girls' teams advances important public policy objectives of equalizing opportunities in interscholastic sports for girls and remedying past discrimination. At the outset, the NJSIAA accepts the burden announced by the Administrative Law Judge at the beginning of hearing that it must show the exclusion of boys from girls' interscholastic teams serves important governmental objectives. In re Crichfield Trust, 177 N.J. Super. 258 (Ch. Div. 1980); Califano v. Webster, 430 U.S. 313 (1977). The "middle tier" test that must be applied here is based upon Craig v. Boren, 429 U.S. 190 (1976). This is distinguished from traditional equal protection analyses and the highest level of scrutiny, where classification is highly suspect and a compelling state interest must be demonstrated.

The exclusion of boys from girls' teams has been uniformly upheld by courts of other jurisdictions with the exception of Massachusetts. That state's Supreme Judicial Court struck down a comparable exclusion because of that state's equal rights provision in its constitution. In the NJSIAA's view, the undesirable results of that decision were vividly recounted in the testimony of the Director of the MIAA.

In Clark v. Arizona Interscholastic Association, 695 F. 2d 1126 (9th Cir. 1982), cert. denied 464 U.S. 818 (1983), it was held that even where there is no team sponsored

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for boys in the same sport, a policy excluding boys from girls' teams is a permissible means of attempting to promote equality of opportunity for girls and of redressing past discrimination.

In Clark, the Ninth Circuit was called upon to review the district court's judgment dismissing a plaintiff's claim that the Arizona Interscholastic Athletic Association's (AIAA) policy of precluding boys from playing on girls' interscholastic volleyball teams in Arizona high schools deprived plaintiffs of equal protection under the Fourteenth Amendment. The plaintiffs were male high school pupils who participated in national championship teams sponsored by the Amateur Athletic Union. They were not, however, permitted to participate on their high school's volleyball teams as those teams were only for girls and an AIAA policy precluded boys from participating on girls' teams although girls were permitted to participate on boys' athletic teams. The reason underlying the AIAA policy, just as that underlying the resolution of the NJSIAA, is to prevent boys from displacing girls on girls' athletic teams. The Ninth Circuit court determined that the governmental interest of redressing past discrimination against women in athletics and promoting equality of athletic opportunity between the sexes is legitimate and an important governmental interest. Further, the court held there was a substantial relationship between the exclusion of males from the team and that goal. 695 F. 2d at 1129 and 1131. The Illinois Appellate Court found similarly in Petrie v. Illinois High School Association, 75 Ill. App. 3d 980 (Ill. App. Ct. 1979). In addition, the Petrie court rejected any sort of quota system as a method of equalizing athletic opportunity between boys and girls.

In a New York case, Mularadelis v. Haldene Central School Board, 74 A.D. 2d 248, 427 N.Y.S. 2d 458 (App. Div. 1980), the court was presented with the issue of whether, under Title IX of the Education Amendments, above, and the regulations promulgated thereunder by the Department of Health, Education and Welfare (45 C.F.R. § 86.31, 86.34 and 86.41(a)(b)), the male student petitioner should have been afforded the opportunity to become a member of the girls' tennis team at his school. As with C.C. here, the petitioner participated on his school's girls' tennis team in the year prior to being advised that he would not be permitted to continue. The court recognized that the petitioner had been ranked number two singles player on that team, thereby effectively denying a female student the opportunity to become a member of the girls' tennis team. 427 N.Y.S. 2d at 460.

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Upon addressing the petitioner's argument based on the federal regulations, the court concluded that the regulation in question permitted exclusion of an individual because of his sex where overall athletic opportunities in the past for members of that individual's sex have not been limited. The petitioner also argued that his exclusion from the team violated the equal protection clause of the Fourteenth Amendment. The court rejected the argument and held that because the federal regulations have as their purpose the reduction and ultimate elimination of disparity in overall interscholastic athletic opportunities, the preclusion of male students from girls' teams is a discernable and permissible means toward redressing disparate treatment of female students in interscholastic athletic programs. Because the overall athletic opportunities for male students exceeded those afforded females, the court further concluded that special recognition and favored treatment can be constitutionally afforded females without violating constitutional due process or equal protection. Id. at 464.

Similarly, a New Hampshire Court, faced with the same issue, ruled that the New Hampshire Interscholastic Athletic Association, Inc. (NHIAA) could prohibit a boy from participating on a girls' high school field hockey team without violating the boy's constitutional rights, Title IX, or state statute which is nearly the same as N.J.S.A. 18A:36-20. Gil, et al. v. New Hampshire Interscholastic Athletic Association (N.H. Sup. Ct., Nov. 8, 1985, 85-E646) (unreported).

The New Hampshire statute at issue proscribes the denial, to any person, of the benefits of educational programs or activities based upon, among other things, that person's sex. The New Hampshire Court ruled that the state statute was not violated. That ruling is significant to the present case:

> No denial of the benefits of an educational program is taking place here, because although [the student] is being denied the opportunity to participate in one particular sport, he has had, and will continue to have, ample opportunity to enjoy the benefits of other components of Timberlane's athletic program. Therefore, this Court finds that the challenged policy does not violate RSA 186:11. [Gil, at 33]

The same observations must apply to this case. Although Cumberland has an extensive girls' program, it does not provide as many girls' sports as boys' sports. In addition to the two coeducational, noncontact sports of swimming and golf, there are nine boys' sports at Cumberland, three of which are in the fall. In contrast, field hockey is

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only one of seven girls' programs available at Cumberland and is the only girls' sport available in the fall. Therefore, not only are the overall opportunities for girls at Cumberland limited when compared to opportunities for boys, but C.C. had three other sports available to him in the fall alone.

The respondents suggest that C.C. do what boys who are deprived of football at certain schools do, namely, avail himself of the opportunity to participate in other fall sports. N.J.S.A. 18A:36-20 and the regulations and guidelines promulgated by the Department of Education envisage opportunities to participate, not guarantees. The petitioner's case is based entirely upon a literal and strict interpretation of N.J.S.A. 18A:36-20. That statute prohibits discrimination against any public school students in obtaining any advantages, privileges or courses of study by reason of sex. Significantly, in both Gil and Petrie, the New Hampshire trial court and the Illinois Appellate Division found that virtually identical statutory provisions did not bar gender-based teams. Nor did the New York courts or the Ninth Circuit find that comparable language in the Fourteenth Amendment mandated the imposition of coeducational teams on previously all-girls' sports. All of these courts recognize that there can be gender distinctions if such classifications advance important public policy such as the expansion of opportunities for female athletics and the correction of past inequities.

The Department of Education has had regulations since 1977 that attempt to accommodate the broad mandates of N.J.S.A. 18A:36-20 while recognizing certain governmental interests in providing for separate athletic teams on the basis of gender. In addition, the Department has formally sanctioned guidelines that would bar boys from being admitted to girls' teams since that would lead to the eventual displacement of girls.

The NJSIAA rightfully has advanced the public policy concerns of health and safety in prohibiting boys from participating on girls' contact sports such as field hockey. Two successful girls' field hockey coaches testified that there are frequent injuries in the sport caused by the use of hockey sticks and balls being propelled at great speeds. Because of the possibility of injury, this is a sport that can be intimidating to many girls whose smaller size and lesser strength places them at a disadvantage. Further, the circumstances present in allowing a boy to compete on a girls' team are different from that of a girl being allowed to participate on a boys' team. In the latter case, the parents

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and the pupil are assuming the risks of injury. In the former instance, a boy is being interjected, most probably with greater strengths, size and speed, into a group of 20 or 30 girls who must involuntarily accept that boys' presence on the playing field.

This tribunal should not disturb the very important policy of the NJSIAA of assuring competitive fairness. The fact is that there are 15 state championships in boys' sports and 14 in girls' sports. The NJSIAA has adopted girls' championship programs to encourage the initiation of those programs among its members. It would be impossible to maintain separate championships with all the qualifications in terms of games won and lost, etc., by gender-based teams, if a girls' team were considered for qualification while using male participants. More importantly, the undisputed testimony is that on the average, given their greater size, speed and strength above the freshman level, boys are able to play field hockey more effectively than girls who have comparable skills and experience. Therefore, schools that allow boys to participate on their girls' team will gain a distinct advantage.

Accordingly, the prohibition of boys participating on girls' interscholastic teams does advance the governmental and public policy objectives of expanding interscholastic athletic opportunities for girls as well as the collateral benefits of assuring proper health and safety standards and competitive fairness. Therefore, the petition should be dismissed.

V.
DISCUSSION AND DETERMINATION

It is first noted that N.J.S.A. 18A:11-5 provides:

> Any amendment to the charter, constitution, bylaws, rules or regulations of the association shall be effective not less than 20 days after its submission to the commissioner. No such amendment shall take effect if the commissioner in said 20-day period returns to the secretary of the association his disapproval of the amendment.

Thus, when the Association delivered its April 15 resolution to the Commissioner on July 8, the 20-day period began to run. The record shows no response from the Commissioner on or before July 29 (July 28 being a Sunday). The resolution became effective by operation of the statute. The letter of September from an assistant

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commissioner to the NJSIAA counsel, therefore, is precatory at best. The Association will certainly consider the Department's expression. That consideration must be directed to new or amended rules, the resolution of April 15 already having taken effect.

The New Jersey Constitution (1947) Article VIII, Section 4, para. 1 provides:

> The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all children in the State between the ages of five and eighteen years.

The right of children to a thorough and efficient system of education is guaranteed. Robinson v. Cahill, 69 N.J. 133 (Robinson IV), cert. den. sub nom. Klein v. Robinson, 423, U.S. 913 (1975), injunction vacated 69 N.J. 449 (Robinson V), 70 N.J. 155 (Robinson VI) (enjoining expenditure of funds for public schools), amended, 70 N.J. 464, injunction vacated 70 N.J. 465 (1976). This is not the same thing as a fundamental right to participate on athletic teams. The goal of a free public education as embodied in the constitutional provision and the Public School Education Act of 1975, N.J.S.A. 18A:7A-1 et seq. is to "provide to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." N.J.S.A. 18A:7A-4.

N.J.S.A. 18A:36-20 provides in full:

> No pupil in a public school in this State shall be discriminated against in admission to, or in obtaining any advantages, privileges or courses of study of the school by reason of race, color, creed, sex or national origin.

In Hinfey, above, it was held that this statute, which forbids discrimination in public schools by reason of sex, is intended to extend the constitutional bases of proscribed discrimination in respect to student opportunities to include gender. As a result, the constitutional proscription against discrimination by reason of sex applies to an activity sponsored by the public schools in this state. This guarantee is a cognizable right. Once a board of education decides to allow participation in extracurricular activities, it must do so in ways that do not unlawfully discriminate against male or female pupils based solely on gender absent a legitimate governmental interest.

N.J.A.C. 6:4-1.5, also cited above, provides:

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(a) No student shall be denied access to or benefit from any educational program or activity solely on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.

. . .

(d) Public school students shall not be segregated on the basis of race, color, creed, religion, sex, ancestry, national origin or social or economic status.

. . .

(f) The athletic program, including but not limited to intramural, extramural, and inter-scholastic sports, shall be available on an equal basis to all students regardless of race, color, creed, religion, sex, ancestry, national origin or social or economic status. The athletic program as a whole shall be planned to insure that there are sufficient activities so that the program does not deny the participation of large numbers of students of either sex.

1. The activities comprising such athletic program shall receive equitable treatment, including but not limited to staff salaries, purchase and maintenance of equipment, quality and availability of facilities, scheduling of practice and game time, length of season and all other related areas or matters.

2. A school may choose to operate separate teams for the two sexes in one or more sports and/or single teams open competitively to members of both sexes, so long as the athletic program as a whole provides equal opportunities for students of both sexes to participate in sports at comparable levels of difficulty and competency.

As the petitioner observes, the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1 et seq. declares that practices of discrimination against any of the State's inhabitants because of sex menaces the institutions and foundation of a free democratic State. N.J.S.A. 10:5-3. All persons shall have the opportunity to obtain employment, and to obtain all the accommodations, advantages, facilities and privileges of any place of public accommodation without regard to their gender. N.J.S.A. 10:5-4.

The federal regulations, 45 C.F.R. 186.41, implementing Title IX of the Educational Amendments of 1972, 20 U.S.C. section 1681, et seq. provide at 186.41(a) and (b):

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(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient of federal funds, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirement of (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sp orts include boxing, wrestling, rugby, ice hockey, football, basketball, and other sports, the purpose or major activity of which involves bodily contact.

In 1983, the United States District Court for the Western District of Missouri held that these regulations, together with Title IX, are neutral as to the issue of whether females must be or may be allowed to participate in contact sports otherwise exclusively reserved for males. Force v. Pierce City R-VI School District, 570 F. Supp. 1020 (W.D. Mo. 1983). More important to the purposes of this case, the court also held that under the circumstances, rules and regulations of the high school interscholastic athletic association and the manner of promulgation and enforcement of those regulations constituted state action. This subjected the Association's actions to equal protection clause requirements and, as such, enforcement of a rule that effectively prohibited members of the opposite sex from competing on the same team in interscholastic football would be enjoined.

It is clear that New Jersey intends to eliminate sex-based discrimination in our public schools. Where a prima facie case of discrimination is shown, a board must demonstrate some interest that the complained of conduct will serve. As observed above, this is a matter of "middle tier" scrutiny. The New Jersey Constitution prohibits discrimination in public schools based on sex. Therefore, the respondents must show some rational relationship between the complained of conduct and the interest to be served.

As the petitioner points out, the debate is over. The Legislature has clearly elaborated what the framers of the 1947 Constitution stated. Notwithstanding the expressions of opinion by certain expert witnesses that male-female field hockey is not

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advisable, none of these persons had any personal experience with mixed male-female field hockey on an interscholastic level. In fact, witnesses presented by the petitioner did have personal knowledge of male-female field hockey and all denied that horrible consequences do in fact occur. Further, the testimony of the Massachusetts Association executive shows that the alleged horrible consequences do not occur.

This controversy is limited by its own circumstances and the provisions set forth in N.J.S.A. 18A:36-20 and N.J.S.A. 10:5-1 et seq. There is no case law precisely on point to lend guidance. However, in E.B. et al. v. No. Hunterdon Bd. of Ed., OAL DKT. EDU 5187-85 (Order, Aug. 20, 1985), the Administrative Law Judge analyzed the applicable law in the context of a female pupil's request to be allowed to try out for the football team at the school. Among other things, the ALJ stated that the petitioner in that matter was denied the opportunity to try out for the team solely on the basis of her sex. The evidence further suggested that the Board denied the petitioner the opportunity to compete, try out and qualify for membership on the high school football team based on an outdated belief that females could not compete with boys rather than on an independent evaluation of her ability. "At the very least, public school pupils who desire to participate on school sponsored interscholastic athletic teams must have their eligibility determined based upon an individualized determination of their ability to play regardless of their sex." Slip opinion at 10.

As in that case, the Board here prohibits the petitioner from a high school team for the sole reason that he is male. This conduct constitutes unlawful discrimination by reason of sex under the laws of this State. This conduct cannot serve a compelling, legitimate interest or an ordinary interest. Cumberland Regional High School has no field hockey team for boys. N.J.S.A. 18A:36-20 and N.J.A.C. 6:4-1.5 have been ignored.

In the face of petitioner's arguments and the clear New Jersey law that governs this issue, the regulation barring boys from girls' teams even where there is no team in the same sport for boys cannot stand. I FIND that the petitioner has shown he has been subjected to unlawful discrimination based entirely on his gender.

The Cumberland Regional High School District is a public school facility. Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. There must be no stereotyping because one gender is presumed to

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be somehow inferior. See Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion). According to the respondents, there is a relationship between the guidance governing girls' athletics (RA-1) and a gender-based classification that would prevent any male from competing with females for a place on the Cumberland field hockey team. Neither a school nor a state interscholastic athletic association can validate an otherwise unconstitutional act by noting that it has agreed with other schools and other associations to commit that act. The interscholastic athletic association performs a valuable and needed service for the schools and citizens of this State. But its rules cannot transcend constitutional requirements. A member school's adherence to those rules cannot make proper that which is not.

It is a source of wonder how athletic opportunities can be maximized by denying C.C. an opportunity to try out for and play on the only field hockey team at his school. I accept the proposition that the average male will to some extent outperform the average female of the same age in most athletic events, although that may be open to legitimate debate.

Nevertheless, the petitioner adduced convincing testimony that stickwork is far more important to success on the hockey field than are sheer size and strength. There is no factual indication that boys will desert traditionally male sports to try out for the field hockey team. Nothing in this record indicates that male pupils at Cumberland Regional High School are waiting eagerly for field hockey to be desegregated. There is no indication that any other male ever has expressed a desire to play on the team.

Finally, even if the respondents' worst fears should be realized, there might still be no need for the general breakdown they postulate. If, for example, a sufficient number of boys wish to play field hockey, the obvious solution would be to organize a boys' field hockey team.

This decision is and must be based on the circumstances and facts as they exist now. It cannot be based on possibilities which might never occur. The fact remains that no male pupil other than C.C. has expressed any desire to play field hockey.

There is apparent in the respondents' arguments an assumption that if, in the interest of maximizing equal athletic opportunities, it is constitutionally permissible to establish separate male and female teams in a given sport and to exclude each sex from

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the other's team, then it is equally permissible, in that same interest, to designate separate male and female sports and to exclude each sex from participation in the other's sport. Force, above. That is a proposition this tribunal cannot accept.

Each sport has unique requirements and characteristics. Necessary physical attributes vary from sport to sport. Each person, male or female, will probably find one or another sport more enjoyable or rewarding than others. To say that C.C. may simply go out for some other fall sport begs the question. Football is not hockey and swimming is not tennis. Therefore, if the goal is to maximize educational athletic opportunities for all students, it is senseless, absent some substantial reason, to deny all persons of one sex the opportunity to test their skills at a particular sport. And it must be noted that the NJSIAA is free to adopt rules limiting but not forbidding boys' participation on field hockey teams. Given the apparently low number of boys potentially involved, this seems a reasonable response.

I can conceive of certain exceptional instances in which there would be a substantial reason for an exclusion, as for example where peculiar safety and equipment requirements demanded. Lafler v. Athletic Board of Control, 536 F. Supp. 104 (W.D. Mich. 1982) (boxing). Those instances, in all probability, would be rare. No such peculiar safety and equipment requirements exist in field hockey.

Having heard and considered the evidence, I FIND:

1. Although incidental contact may occur, field hockey is not a contact sport.

2. Safety and equipment requirements for field hockey are not exceptional to such a degree as to require the exclusion of males from participation on female teams.

3. Stickwork is of greater importance than mere size and speed in field hockey play.

4. Credible testimony established that some Cumberland girls were and are superior to C.C. in certain facets of the sport.

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5. The exclusion of C.C. was based solely on his gender.

6. No substantial public interest is served by the exclusion.

7. Cited New Jersey law forbids discrimination based on sex alone.

Clark, Petrie, and Mularadelis, above, are not precisely on point with this case. However, assuming the facts in those cases are sufficiently similar to the facts in this case to allow analogy, the concept of redress for past discrimination has been weakened significantly in Firefighters Local No. 1784 v. Stotts, ____ U.S. ____, 81 L. Ed. 2d 483 (1984) (restoring white employees on basis of seniority following a layoff even though percentage of black employees would drop approved, seniority clause in labor contract stronger interest than maintaining racial balance or quota). C.C.'s constitutuional and statutory rights not to be discriminated against on the basis of gender are at least as strong as a labor contract seniority clause.

The idea that maximizing participation of both sexes in interscholastic athletic events is a worthy and important governmental objective cannot be gainsaid. Nor is there any question of the sincerity of the respondents' efforts in this case. In the circumstances of this case, however, I must **CONCLUDE** that the gender-based classification used by the respondents does not bear sufficient relationship to that objective to withstand challenge.

Accordingly, it is **ORDERED** that C.C. be allowed to participate as a member of the field hockey team at Cumberland Regional High School so long as, in the coach's judgment, his skills, attitude and team play will contribute to the success of the team and so long as he shall otherwise be eligible.

The petitioner has also demanded monetary damages both in a compensatory and punitive amount, costs of bringing this action, including reasonable attorney's fees and any other relief the Commissioner of Education determines appropriate. However, the petitioner has put nothing before me in support of these requests. Accordingly, they are not addressed.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3 APRIL 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

APR · 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 4 1986
DATE

Ronald L. Parker /x5
OFFICE OF ADMINISTRATIVE LAW

ij/ee

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B.C., on his own behalf and on behalf of his minor son, C.C., PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CUMBERLAND REGIONAL SCHOOL DISTRICT ET AL., CUMBERLAND COUNTY, RESPONDENTS.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the NJSIAA and reply exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a, b, and c.

At the outset of its exceptions, NJSIAA requests that the record in this matter be supplemented by a copy of the Athletic Guidelines issued by the Department of Education, Office of Equal Educational Opportunity (OEEO), on March 20, 1986, superseding the September 1, 1978 guidelines submitted as Exhibit RA-10 in this matter. The new guidelines, NJSIAA comments, as well as the superseded guidelines, "focus upon maintaining and promoting opportunities for females in sports, recognizing that overall athletic opportunities for females have been and continue to be less than that (sic) provided for males***." (NJSIAA's Exceptions, at p. 1) Moreover, avers NJSIAA, these guidelines "provide that the applicable regulations promulgated by the Department of Education, N.J.A.C. 6:4-1.5(f), require only that both sexes are afforded the 'opportunity to compete in athletics in a meaningful way.'" (Id., at pp. 1-2, quoting Exhibit A, at p. 3, q. 4) NJSIAA avers that the revised guidelines make it crystal clear that they are focused upon the promotion of girls' athletics. NJSIAA contends the ALJ ignored this critical governmental objective and instead determined, with little analysis, that there is no reason to exclude C.C. from the Cumberland Regional field hockey team. He not only ignored relevant legal precedent, argues NJSIAA, but conducted inadequate fact-finding.

The NJSIAA exceptions next review the Statement of Facts and Statement of Procedural History which were presented to the ALJ in its post-hearing brief and which are incorporated herein by reference. To its account of the Statement of Facts, NJSIAA's exceptions add:

> While the NJSIAA agrees with Judge Campbell's determination that the Resolution [to adopt the updated 1978 Guidelines regarding boys participating on girls' teams and related issues]

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> became effective on July 29, 1985 by operation of N.J.S.A. 18A:11-5, it recognizes that the Commissioner of Education may not accept this determination. Even if the Resolution does not come within the purview of N.J.S.A. 18A:11-5, Dr. Walter McCarroll, Assistant Commissioner, agreed with Section 1 of the Resolution, prohibiting boys from participating on girls' teams in the response of the Department of Education, on September 3, 1985 (Exh. G).
>
> (NJSIAA's Exceptions, at p. 5)

The NJSIAA exceptions recount the testimony of its witnesses, arguments concerning which were included in NJSIAA's post-hearing brief. Such arguments are incorporated herein by reference. To its account of that testimony, the NJSIAA's exceptions add that the ALJ only mentioned in the initial decision that Mr. Kanaby testified, and cited none of this "critical testimony concerning the advancement and promotion of girls' athletics." NJSIAA contends that "[g]iven the fact that Mr. Kanaby is probably the foremost expert in New Jersey in interscholastic sports, and an individual with national stature in high school athletics, his testimony should not have been given such short shrift." (NJSIAA's Exceptions, at pp. 6-7)

The NJSIAA exceptions corrected the record that Richard Neal, the Executive Director of the Massachusetts Interscholastic Athletic Association testified on behalf of petitioner. Rather, NJSIAA notes that Mr. Neal appeared on behalf of the NJSIAA. NJSIAA summarized the testimony of Mr. Neal as stating that in every instance where boys in the state of Massachusetts, which is the only state in the nation to allow boys on girls teams because of the 1979 Court decision, Attorney General v. Massachusetts Interscholastic Athletic Association, 393 N.E. 2d 284 (Mass. 1979), they displaced girls and, further, that it was evident that many girls were being discouraged from even participating in girls' athletic programs. NJSIAA reiterates its position taken at the hearing that Mr. Neal joined Mr. Kanaby in his judgment that boys should not be allowed to participate on girls' athletic teams because it would definitely displace girls, would be unfair from a competitive standpoint, and would definitely raise issues of health and safety. All of these problems have arisen in Massachusetts due to boys' participation on girls' teams, according to Mr. Neal, NJSIAA avows. Its exceptions further state:

> Seemingly ignoring this testimony, Judge Campbell commented that Mr. Neal's testimony showed "that the alleged horrible consequences do not occur." (Initial Decision, p. 25). Frankly, the NJSIAA does not understand what Judge Campbell would consider a "horrible consequence", given the important governmental interest in promoting girls' sports and, at the same time, ensuring their health, safety and welfare. ***The NJSIAA seeks to promote equal athletic opportunities for

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> females and to redress the effects of past discrimination and disparate treatment relating to girls' athletics. The gains the NJSIAA has made should not now be reversed.
> (NJSIAA's Exceptions, at p. 8)

Countering the ALJ's conclusion that "NJSIAA has no studies or documentary evidence of health or safety problems based on male participation on predominately female teams" (Initial Decision, at p. 10), NJSIAA posits that the Massachusetts experience is "real life evidence" of the problems that may and do occur. (emphasis in text)(NJSIAA's Exceptions, at p. 9)

NJSIAA similarly objects to the fact that the ALJ ignored or diminished the testimony of Barbara Skiba, a girls' field hockey coach for 18 years. Her testimony indicated that boys should not be allowed to play field hockey because it would definitely displace girls, would intimidate many girl participants and would raise serious safety questions. Further, another coach, Steven Timko, corroborated Ms. Skiba's testimony, NJSIAA avows, when he proffered his opinion that the number of girls who participate on his swim team has increased geometrically since the inception of separate teams. NJSIAA contends that the only way to achieve the important goals advanced by it is to exclude boys from girls teams, and that its witnesses affirmed this fact.

NJSIAA excepts to the fact that the ALJ ruled, with little analysis, that "the debate is over." (Initial Decision, ante) It avows that the ALJ discarded the five cases in which various courts, including the 9th Circuit Court of Appeals, upheld decisions to exclude boys from girls' athletic teams. Reciting the legal arguments incorporated in its post-hearing brief, NJSIAA added in exceptions that:

> Any suggestion by Judge Campbell that Firefighters v. Stotts, *** 104 S.Ct. 2576 (1984) somehow weakens Clark, [9th Circuit Court of Appeals decision, supra] or any of the other decisions, is without basis. Stotts has no applicability to this case whatsoever. The U.S. Supreme Court's decision was based upon an exception to Title VII involving a bona fide seniority system. See 42 U.S.C.A. sec. 2000e-2(h). ***Indeed, that Judge Campbell chose to rely upon this decision and ignore those cases dealing with the specific issues at hand, such as Clark, serves to further undermine his conclusions. (NJSIAA's Exceptions, at p. 12)

Further, NJSIAA avers, the opportunity afforded girls to participate on boys' teams has been settled and need not be discussed here. "Indeed," NJSIAA contends, "Judge Campbell was plainly wrong in commenting that the NJSIAA seeks to exclude each sex from the other's team (see Initial Decision, ante). The primary rationale for excluding boys from girls' teams is the promotion of

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girls' sports and the protection of the gains made over the very recent past." (NJSIAA's Exceptions, at p. 14)

In conclusion, NJSIAA urges the Commissioner to sustain Section One of the NJSIAA Resolution of April 15, 1985, allowing the exclusion of boys from girls' athletic teams and, accordingly, to dismiss the petition with prejudice and without cost to NJSIAA.

Petitioner initially objects to the attempt by NJSIAA to supplement the record at this point. Petitioner contends that the current attempt deprives him of any opportunity to counter or refute such evidence. Petitioner further asserts that supplementing the record at this point deprives him of any opportunity to conduct a cross examination of the witness through which this evidence would be entered.

Otherwise, petitioner essentially agrees with the initial decision of the ALJ and urges the Commissioner to adopt that decision in its entirety. In furtherance of that position, petitioner submits his letter memoranda of January 28 and February 18, 1986 for the Commissioner's consideration. Said documents are incorporated herein by reference.

Having reviewed the record in this matter, the Commissioner rejects the determination of the ALJ that "C.C. be allowed to participate as a member of the field hockey team at Cumberland Regional High School so long as, in the coach's judgment, his skills, attitude and team play will contribute to the success of the team and so long as he shall otherwise be eligible" (Initial Decision, ante) for the following reasons.

Initially, the Commissioner wishes to address the exception raised by petitioner relative to the allegation that respondent improperly sought to supplement the record by making reference to the 1986 Athletic Guidelines issued for the purpose of clarification and implementation of N.J.S.A. 10:5-1 et seq., and N.J.S.A. 18A:36-20 by OEEO on March 20, 1986. The Commissioner takes notice of the OEEO Athletic Guidelines pursuant to N.J.A.C. 6:24-1.11 and 1.13. He does so recognizing that the language in the 1986 Guidelines, as well as in the superseded ones, focuses upon maintaining and promoting equal opportunities for females in sports, recognizing that overall athletic opportunities for females have been and continue to be less than those provided for males.

The Commissioner recognizes that the standard of review in this facial classification, sex discrimination case brought under the Equal Protection Clause of the U.S. Constitution is the "intermediate" or "middle tier" test enunciated in Craig v. Boren, 429 U.S. 190 (1976). This test is the one most often employed in gender discrimination challenges and is one under which "discrimination is more difficult to prove than when the strict scrutiny test is utilized."[1]

[1]Pryor, Barbara L., "Equal Protection of Athletics," 72 Kentucky L.J. 935 (1984), at pp. 938-39.

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> The intermediate level of scrutiny consists of a two-part test. First, an important government interest must be shown to be the basis for the dissimilar treatment. However, even if the asserted government interest is determined to be important, it will still fail the first part of the test if it is not a "legitimate" government purpose. For example, if the asserted interest is not the government's actual interest or if it is an unnecessary interest, the regulation containing the gender based classification will fail this part of the test. Once an important government interest is determined to be legitimate, the gender based classification will be sustained if the second part of the intermediate test is met. To pass the second part of the test, the gender based classification must be substantially related to fulfilling the important government interest.[2] (emphasis in text)

The Board herein prohibits C.C. from participation on a high school team for the sole reason that he is male. This action taken based upon reliance on NJSIAA's April 15, 1985 Executive Committee Resolution, which is facially discriminatory, may be permissible, however, if respondent is able to prove that prohibiting boys from playing on an all-girls' team, in this case, field hockey, is a narrowly tailored means of achieving an important governmental goal. The NJSIAA Executive Committee Resolution of April 15, 1985 sets forth the goals which it was interested in advancing which derive from Question 8 of the OEEO Athletic Guidelines dated September 1, 1978, to wit:

> 8. Q. If a school sponsors a team in a particular sport for one sex but no similar team is provided for members of the opposite sex, must the excluded sex* be allowed to try out for that team?
>
> *excluded sex means that sex not provided a team in a particular sport.
>
> A. If overall athletic opportunities are limited for either sex (in many cases, this will apply to females), then the sex having limited opportunities must be allowed to try out for that team. (Refer to question #4 which details how a school evaluates overall athletic opportunities.)
>
> If overall athletic opportunities are not limited for one sex (very often males), the

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[2] Id.

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school is not required to permit the excluded sex to try out. For example, if a school provides gymnastics for girls and no such team for boys, the school is not required to permit boys to try out if their overall athletic opportunities are not limited.

If it can be shown that neither sex has limited opportunities, the school may establish its own policy as to whether students of one sex may try out for teams established for members of the opposite sex.

Further, Question Ten of the revised 1986 OEEO Athletic Guidelines is also substantially in agreement with section one of the NJSIAA Executive Committee Resolution dated April 15, 1985. Question Ten is recited below:

10. QUESTION: If a school sponsors a team in a particular sport for one sex but no similar team is provided for members of the opposite sex, must the excluded sex* be allowed to try out for that them?

*excluded sex means that sex not provided a team in a particular sport.

ANSWER: If athletic opportunities are limited for either sex (in most cases, this will apply to females), then the sex having limited opportunities must be allowed to try out for that team. (Refer to question #4 which details how a school evaluates athletic opportunities. This includes consideration of the number of sports and numbers of teams--varsity, junior varsity, frosh -- established in those sports.)

If athletic opportunities are not limited for one sex (usually males), the school shall not allow the excluded sex to try out. For example, if the school provides gymnastics for females but no such team for males, the school should not permit a male to try out for gymnastics provided athletic opportunities are not limited for males. If there are enough males interested, a separate male team may be established.

At this point, the Commissioner wishes to clarify his position concerning the NJSIAA Executive Committee Resolution of

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April 15, 1985. The Commissioner's objection to the Resolution was not to the content of that particular paragraph which related to the elimination of boys from girls' athletic teams but, rather, the manner in which NJSIAA sought to amend its formal rules, which the Commissioner's representative, Dr. Walter McCarroll, found to be inconsistent with N.J.S.A. 18A:11-5.

In fact, the Commissioner was in accord with the basic principle involved, that boys not be permitted to participate on girls' teams, but Assistant Commissioner McCarroll did not accept it as a formal rule because of the manner in which NJSIAA adopted it, i.e., by resolution rather than by amending its constitution or bylaws. Further proof of the Commissioner's intent to promulgate a rule to this effect is provided by the fact that the Commissioner has since approved, through the OEEO, an updated version of its Athletic Guidelines, which does indeed affirm the position of NJSIAA as stated in its April 15, 1985 Executive Committee Resolution, Section One.

For the record, the following correspondence from Dr. McCarroll to counsel for NJSIAA, dated September 3, 1985, is recited below:

> I have reviewed the resolution on Girls' Athletic Programs passed by the Executive Committee of the New Jersey State Interscholastic Athletic Association on April 15, 1985 and officially received by the Department on July 8, 1985. This review was conducted in conjunction with Barbara Anderson and her OEEO staff and in consultation with Dr. Weiss, Director of the Bureau of Controversies and Disputes and the Attorney General's Office. Based upon our discussions, we are prepared to provide guidance to the NJSIAA on the issues raised by the resolution but it is not our intention that such guidance be construed as formal approval or disapproval as contemplated by your resolution.
>
> The Commissioner has long emphasized that policy development and rulemaking as it relates to interscholastic athletics is the responsibility of the NJSIAA with oversight authority vested by law in the Commissioner. We therefore do not deem it appropriate to make rules and establish policy through resolutions presented to the Commissioner for approval. Such a practice is not orderly, efficient or effectively instructive to your constituency or the Department of Education which must review actions of your association. All information required by association members in order to organize and carry out their interscholastic athletic programs should be available to them within the one volume

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of your regulations, constitution and bylaws, rather than scattered among a number of different sources.

Notwithstanding the above, let me share with you the results of our review and discussions of the aforementioned resolutions.

While we essentially agree with resolutions #1 and #3, we do not believe that resolution #2 is in conformity with N.J.A.C. 6:4-1.5(f). While we are aware that federal regulations permit the exclusion of participation on the basis of gender in sports designated as contact sports, New Jersey regulations do not make that distinction and the Attorney General in a formal opinion to the Department of Education in 1975 makes that point clear.***

Further, I would raise one caveat to our general agreement with resolution #3. While it indicates girls "are not entitled to participate on boys' teams where there are girls' teams in the same sport***" we think that it should be made clear that districts are not precluded from permitting such participation if they so choose.

I hope that the guidance provided in this letter will assist you in developing appropriate rules and regulations for review by the Commissioner pursuant to N.J.S.A. 18A:11-5.

The Commissioner cites with approval the statement of the ALJ that:

> Although the test for determining the validity of a gender-based classification is straightforward, it must be applied free of fixed notions concerning the roles and abilities of males and females. There must be no stereotyping because one gender is presumed to be somehow inferior. See Frontiero v. Richardson, 411 U.S. 677 (1973) (plurality opinion).
>
> (Initial Decision, ante)

Moreover, the Commissioner heartily agrees with the ALJ that:

> [t]he idea that maximizing participation of both sexes in interscholastic athletic events is a worthy and important governmental objective cannot be gainsaid. Nor is there any question of the sincerity of the respondents' efforts in this case. (Initial Decision, ante)

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> The NJSIAA elaborates on these reasons as follows: The purposes of Section 1 are two-fold: 1) the promotion of equal athletic opportunities for females, and 2) to redress the effects of past discrimination and disparate treatment relating to girls' athletics. If boys were permitted to participate on girls' interscholastic athletic teams, there would be a substantial risk that boys would dominate the girls' program and thus cause a displacement of girls from participating on those teams. Any displacement of girls from those teams would further limit their opportunities for participation in interscholastic athletics. Further, this policy is constitutionally sound because males have historically enjoyed greater athletic opportunities than have girls. Similarly, boys currently have ample opportunity for participation in interscholastic sports and sufficient avenues for interscholastic participation. However, once both sexes are afforded overall equal athletic policy and the effects of past discrimination and past disparate treatment relating to girls' athletics are eliminated, it would no longer be necessary to prohibit boys from trying out for female athletic teams.
> (Resolution of NJSIAA Executive Committee Concerning Guidelines Governing Girls' Athletic Programs, April 15, 1985)

The Commissioner notes several cases from other jurisdictions cited by Respondent NJSIAA which are on point and have considered the narrow issue of whether male students may play on an otherwise entirely female team. The Superior Court of New Hampshire, faced with precisely the same issue before this court, ruled that the New Hampshire Interscholastic Athletic Association, Inc. (NHIAA) could prohibit a boy from participating on a girls' high school field hockey team without violating the boys' constitutional rights, Title IX, or a state statute which is almost identical to N.J.S.A. 18A:36-20. Gil et al. v. New Hampshire Interscholastic Athletic Association, Number 85E-646, New Hampshire Superior Court Decision (November 8, 1985). Therein, the New Hampshire court cites Clark v. Arizona Interscholastic Association, 695 F. 2d 1126 (9th Cir. 1982), for the proposition that redressing past discrimination against female athletes and promoting and encouraging the development and equality of girls' interscholastic sports is indeed an "important governmental objective." (at 1131, quoting Petrie v. Illinois High School Association, 75 Ill. App. 3d 980, 394 N.E. 2d 855 (1979))

Petrie also held:

> We deem the preservation, fostering and promotion of interscholastic athletic competition for both

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> boys and girls to be a matter of compelling governmental interest. (Id., at 990)

See also Fort v. Board of Ed., 431 N.Y.S. 2d 321 (1980), Mulardelis v. Haldane Central School Board, 427 N.Y.S. 2d 458, 74 A.D. 2d 248 (1980) (N.Y. App. Div. 1980)

On the basis of NJSIAA's stated reasons, as supported by testimony of its director, Mr. Robert Kanaby, and in agreement with the New Hampshire, Arizona and Illinois courts, the Commissioner has no difficulty in concluding that important governmental objectives are served by the NJSIAA policy in question, as did the ALJ. Thus, the first prong of the Craig v. Boren standard is satisfied in the instant matter.

Where the Commissioner diverges from the position of the ALJ is in consideration of the issue of whether or not the NJSIAA policy is "substantially related" to the achievement of NJSIAA's stated objectives. With the statement that "the debate is over," the ALJ concluded that since N.J.S.A. 18A:36-20, N.J.S.A. 10:5-1 et seq. and N.J.A.C. 6:4-1.5 forbid discrimination by reason of sex and that the conduct of the Board in precluding C.C. from playing on the girls' field hockey team "cannot serve a compelling, legitimate interest or an ordinary interest," such conduct constitutes unlawful discrimination. (Initial Decision, ante) The Commissioner disagrees.

Respondent NJSIAA established ample testimony suggesting that inclusion of males on girls' field hockey teams increases the risk of injury. See, e.g., letter of December 12, 1985 from Timothy Carroll, President, Cape & Islands Principals' Association, and Allan Sullivan, President, Cape & Islands Athletic Directors' Association, to Mr. Sherman A. Kinney, Associate Executive Director M.I.A.S., which stated, inter alia:

> 1. Intimidation and safety factor - It is a known fact that boys are physically stronger than girls, have the ability to hit the ball harder, throw it farther, run faster, etc. The potential for a 180-pound male athlete sliding into home plate against a 120-pound female catcher exists. The catcher risks injury, or worse, fails to execute the play well because of fear of injury.
>
> (NJSIAA's Exceptions, Exhibit L, at p. 1)

The Commissioner is unpersuaded by the argument raised by petitioner that as a non-contact sport, field hockey, unlike some other sports, is inherently non-dangerous. What is relevant to the issue of health and safety in the instant matter is the notion of "average differences," a concept discussed by the Gil Court. Therein, the New Hampshire Superior Court stated:

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> Although some girls are bigger, heavier, stronger, faster and otherwise more skilled than some boys, the evidence presented leads to the clear conclusion that as a rule, and as a class, boys exceed girls in all of those characteristics. They are generally taller, heavier, stronger, faster, more agile, have a greater muscle-to-fat ratio, and otherwise possess more of the physiological attributes which potentially make for better field hockey players. Because of these reasons, if boys were allowed to freely compete with girls for opportunities to play field hockey, boys could generally surpass girls in such competition, and could therefore come to dominate the sport. Some girls might surely win places on a team, but boys could clearly displace many potential girl players. Indeed, even if only an extremely small minority of boys chose to go out for field hockey, girls would still be displaced.
>
> (emphasis supplied)(Gil, supra, at p. 5)

The 9th Circuit was of the same opinion in Clark:

> The only question that remains, then, is whether the exclusion of boys is substantially related to this interest. The question really asks whether any real differences exist between boys and girls which justify the exclusion; i.e. are there differences which would prevent realization of the goal if the exclusion were not allowed.
>
> The record makes clear that due to average physiological differences, males would displace females to a substantial extent if they were allowed to compete for positions on the volleyball team. Thus, athletic opportunities for women would be diminished. As discussed above, there is no question that the Supreme Court allows for these average real differences between the sexes to be recognized or that they allow gender to be used as a proxy in this sense if it is an accurate proxy. See, e.g. Kahn v. Shevin, 416 U.S. at 355, 94 S.Ct. at 1737, 40 L.Ed. 2d at 193; Michael M. v. Sonoma County Superior Court, 450 U.S. at 469, 101 S.Ct. at 1204, 67 L.Ed 2d at 442; Orr v. Orr, 440 U.S. 268, 280-82, 99 S.Ct. 1102, 1112-13, 59 L.Ed. 2d 306, 319-21 (1979). This is not a situation where the classification rests on "'archaic and overbroad' generalization [citation omitted]," Califano v. Goldfarb, 430 U.S. at 207, 97 S.Ct. at 1027, 51 L.Ed. 2d at 276, or "the baggage of sexual stereotypes," Orr v. Orr, 440 U.S. at 283, 99 S.Ct. at 1114, 59 L.Ed. 2d at 321. Nor is

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> this a situation involving invidious discrimination against women, Michael M., 450 U.S. at 475, 101 S.Ct. at 1207, 67 L.Ed. 2d at 446, or stigmatization of women. The AIA is simply recognizing the physiological fact that males would have an undue advantage competing against women for positions on the volleyball team. Petrie, 75 Ill. App. 3d at 988-89, 31 Ill. Dec. at 660, 394 N.E. 2d at 862. The situation here is one where there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women. (at 1131)

The Commissioner is entirely persuaded, as were the Clark and Gil Courts under facts markedly similar to the instant matter, that there is clearly a substantial relationship between the exclusion of males from the team and the goal of redressing past discrimination and providing equal opportunities for women athletes.

Petitioner's arguments concerning less drastic alternatives are duly noted. However, as the 9th Circuit mentioned in the Clark decision:

> The existence of these alternatives shows only that the exclusion of boys is not necessary to achieve the desired goal. It does not mean that the required substantial relationship does not exist. Cases such as Kahn v. Shevin show that absolute necessity is not required before a gender based classification can be sustained. In Kahn, the tax credit could have been determined on the basis of actual need rather than on females' tendency on the average to have greater need. Nevertheless, the court allowed the classification. (emphasis in text)(Id., at 1131)

Thus, the remedy tailored to redress past discrimination based on sex discrimination need not be a "perfect fit." As the Court in Clark went on to say:

> In this case, the alternative chosen may not maximize equality, and may represent trade-offs between equality and practicality. But since absolute necessity is not the standard, and absolute equality of opportunity in every sport is not the mandate, even the existence of wiser alternatives than the one chosen does not serve to invalidate the policy here since it is substantially related to the goal. That is all the standard demands. Kahn v. Shevin, 416 U.S. at 356 n. 10, 94 S.Ct. at 1737-38 n. 10, 40 L.Ed. 2d at 193-94, note 10. While equality in specific sports is a worthwhile ideal, it should

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> not be purchased at the expense of ultimate equality of opportunity to participate in sports. As common sense would advise against this, neither does the Constitution demand it.
> (Id., at 1131-32)

The less drastic alternatives suggested by petitioner, i.e., handicapping the team when it is coed, limiting the number of males who might vie for a position on the all-girls' hockey team, etc. are unwieldy. Such alternatives would still result in the displacement of females. Thus, the Commissioner finds such alternatives to be a hindrance, at this juncture, to the stated goals of redressing past discrimination and advancing female participation in sports.

The Commissioner concurs with the exception of NJSIAA that the issue of girls' participation on otherwise all-boys' athletic teams is not before him in the instant matter. That issue was resolved in the Commissioner of Education Decision captioned, E.B., an infant by her parent and guardian ad litem, D.B. v. Board of Education of the North Hunterdon Regional School District, Hunterdon County and Robert Hopek, decided by the Commissioner August 22, 1985 and May 1, 1986. E.B. has no bearing on this matter wherein alleged reverse discrimination is at issue. Furthermore, in E.B. the female participant assumed the risk participating in an all-boys' team, thereby making moot the concern for the "average differences" health and safety concern inherent in a single female's participation on an otherwise all-male football team. In the instant matter, it is the welfare of the members of the team who are not in a position to provide safety waivers, that is, the females who comprise the majority of the girls' teams with which the Commissioner is concerned.

Finally, both the 1978 and the 1986 Athletic Guidelines promulgated by OEEO for the purposes of clarification and implementation of N.J.S.A. 10:5-1 et seq. are unequivocal that the intent of the law is to provide overall equal athletic opportunity. The following letter to all Chief School Administrators from the Commissioner of Education, dated March 21, 1986, which accompanied the 1986 Athletic Guidelines elaborates upon that which is stated within the Guidelines:

> New Jersey law requires that public school students should be given an equal opportunity to enjoy the benefits and privileges of full participation in all aspects of school life. As Commissioner of Education, it is my legal responsibility to assure that these guarantees become a reality. The statutory and regulatory principles of equality of opportunity in all educational programs are set forth in N.J.S.A. 18A:36-20 and N.J.A.C. 6:4-1.1 et seq. They are intended to provide that:

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1. Schools insure equity in all aspects of the athletic program which is generally defined as:

   a. equal athletic opportunity, measured by the number of teams open to females and males at various levels of varsity and subvarsity competition;

   b. relatively equal numbers of females and males participating on both interscholastic and intramural teams; and

   c. equity in scheduling and access to supportive resources and services.

2. No differentiation be made between contact and non-contact sports, making New Jersey regulations more stringent than federal Title IX regulations.

3. Schools expand athletic program participation for students with fewer athletic opportunities. If one sex has fewer opportunities than the other, the sex with fewer opportunities must be allowed to try out for the opposite sex's team if the excluded sex has no team in the same sport at the same level of competition.

Since both statutory and regulatory language is often presented in terms of general principles, there is a need to provide guidance as to the application of those general principles in specific situations. The guidelines are presented in the format of "most frequently asked questions" relating to the application of the general principles contained within the statute and regulations. These updated guidelines are presented as a means of assisting local districts in applying the principles of sex equity as they relate to athletic programs.

Allegations of denial of equal opportunity not resolved at the local level frequently are heard and decided through the administrative hearing process which exists in my office. One such case arose from the attempts of a female student who sought and was denied the opportunity to play on her high school football team. That denial of participation was grounded upon an application of the federal Title IX regulations which permit schools to deny equal opportunity for participation by a member of one sex on the team

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of the opposite sex if the sport involved is a contact sport. Based upon an opinion of our Attorney General interpreting the state board regulations, my decision permitted the student in question to participate in football because our state regulations make no distinction between contact and non-contact sports in applying the principles of equal opportunity for participation in athletics. Therein I emphasized the guiding principle that since state law is more expansive than the federal law, local districts must be guided by the state regulations.

It is my hope that the foregoing guidelines will be of practical assistance to local school districts in implementing and assuring equality of opportunity to all our students.

See also Questions 4, 6 and 7 of the 1986 OEEO Guidelines, to wit:

4. Question: How does a school determine whether equity exists for males and females in its interscholastic athletic program?

   Answer: A school should evaluate its athletic program by assessing whether there is equality between males and females with respect to the following specific criteria:

   (a) athletic opportunities, measured by the number of sports and the levels of the teams provided in all seasons -- e.g., varsity, junior varsity, sophomore, freshman, -- to effectively accommodate the interests and abilities of members of both sexes; (See questions 6, 7.)

6. Question: Must a school permit females to try out for the male team in an interscholastic sport if it maintains that sport for females only on an intramural basis?

   Answer: Yes. If overall interscholastic athletic opportunities for females are limited, females must be permitted to try out for any sport which is offered if they do not have their own interscholastic team. Intramural teams are not the same as interscholastic teams.

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7. Question: If a school has a sufficient number of females indicating interest in a sport but no nearby schools sponsor teams for females in that sport, would the school be justified in not establishing a female team until such an outside competition develops?

   Answer: If athletic opportunities for females are equal to males, then the school need not establish a female team for that sport. If a sufficient number of females indicate interest in a sport and athletic opportunities for females are limited, difficulty in scheduling would not alone justify refusal to establish a female team for that sport.

   If male teams have travelled distances to find adequate competition when initiating new sports, female teams should be established and conferences built up in the same way. Meanwhile, a school might initiate a new sport through league affiliations or on a county-wide basis. One method to build a team may be through a multi-year plan: 1) develop an intramural program; 2) begin a limited interscholastic schedule; and 3) progress to a full schedule.

See also 1978 OEEO Athletic Guidelines, Questions 4 and 8, to wit:

4. Q. How does a school determine whether it is providing equity for males and females in its athletic program?

   A. A school should self-evaluate its athletic program to determine whether equity exists in its overall plan by considering the following specific factors***.

8. Q. If a school sponsors a team in a particular sport for one sex but no similar team is provided for members of the opposite sex, must the excluded sex* be allowed to try out for that team?

   *excluded sex means that sex not provided a team in a particular sport.

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A. If overall athletic opportunities are limited for either sex (in many cases, this will apply to females), then the sex having limited opportunities must be allowed to try out for that team. (Refer to question #4 which details how a school evaluates overall athletic opportunities.)

If overall athletic opportunities are not limited for one sex (very often males), the school is not required to permit the excluded sex to try out. For example, if a school provides gymnastics for girls and no such team for boys, the school is not required to permit boys to try out if their overall athletic opportunities are not limited.

If it can be shown that neither sex has limited opportunities, the school may establish its own policy as to whether students of one sex may try out for teams established for members of the opposite sex.

The Commissioner notes with approval the analysis of the New York State Supreme Court, Appellate Division, in Mulardelis v. Haldane Central School Board, 427 N.Y.S. 2d 458 (1980) in interpreting the phrase "overall equal athletic opportunity." The Gil case, supra at 31, incorporated the New York Court of Appeals' interpretation of the term in its opinion as follows:

> [T]he phrase "athletic opportunities for members of that (excluded) sex have previously been limited" should be interpreted in a general sense, namely that where overall athletic opportunities for members of a sex excluded from participation in a particular sport have been limited in the past, members of the excluded sex must be allowed to try out for the team from which they are now excluded. Thus, because only women previously suffered limited athletic opportunities, the phrase in dispute refers only to women. Such interpretation in this instance would permit the formation of a separate female [tennis] team without, inter alia, males being allowed to try out for such female team because overall athletic opportunities for males have not been limited in the past. Mulardelis at 461.

As the Justice further noted:

"The 'overall athletic opportunity' standard, which I believe is the one envisioned under the Title IX regulations, permits school authorities

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> to preclude males from participating in a particular sport in a given situation. It does not present an absolute bar to males where members of that sex have had, and continue to have, greater overall athletic opportunities. In the case at bar male students under the regulations have an equal opportunity to participate in athletics in general." Id. at 463-464. (Gil, at 31-32)

The Commissioner is in accord with the Mulardelis Court and also with the Gil Court in concluding that:

> The evidence in the present case is unequivocal that females have historically been denied opportunities in interscholastic athletics. *** Correspondingly, it is clear that boys have not in past and are not at present suffering from limited opportunities in interscholastic athletics. Therefore, since their overall athletic opportunities have not been limited, Title IX is not violated by the *** exclusion of boys from participating in field hockey competition. (Gil, at 32)

Finally, the Commissioner notes NJSIAA's exception that Firefighters Local No. 1784 v. Stotts, supra, is inapposite to the instant matter. The Commissioner agrees. As NJSIAA notes, Stotts, a U.S. Supreme Court decision, was based upon an exception to Title VII involving a bona fide seniority system. See 42 U.S.C.A., sec. 2000e-2(h). Therein the Court held that racial discrimination could not be remedied by disturbing a contractual seniority system. The Commissioner concurs with NJSIAA that "[t]hat has absolutely nothing to do with the goal of eradicating past discriminatory treatment in girls' interscholastic athletics." (NJSIAA's Exceptions, at p. 12)

Accordingly, the Commissioner concludes that in the instant matter, there is none of the invidious discrimination or arbitrary action against one sex which would call for invalidation of the NJSIAA guidelines. Further, as the New Hampshire Court so succinctly concluded:

> Moreover, implementation of the Plaintiffs' position would be, in the opinion of this Court, detrimental to the overall nature and function of the interscholastic athletic system. It would change the character of the competition to make it less fair, and in the process block the achievement of many of the educational goals acknowledged by both parties to be essential to the athletic program. (Gil, at 34)

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Lastly, NJSIAA requested in its exceptions that this Petition of Appeal be dismissed without prejudice and without cost to NJSIAA. (NJSIAA's Exceptions, at p. 20)

In Hogan v. Kearny Board of Education, 1982 S.L.D. 329, State Board 356, the State Board found that, except for indemnification for the costs of defending board employees or office holders pursuant to N.J.S.A. 18A:16-6, there is no statutory authority for the award of counsel fees for cases arising under the school laws. The State Board added:

> We wish to add that, since the underlying action for which legal fees were incurred did not arise out of the duties or in the course of the performance of duties of members of the Board pursuant to N.J.S.A. 18A:16-6, there is no authority to award reimbursement of legal fees and expenses.*** (at 356)

Thus, while the "*** Supreme Court has repeatedly 'reaffirmed the great breadth of the Commissioner's powers,' recognizing that he has 'fundamental and indispensable jurisdiction over all disputes and controversies arising under the school laws, N.J.S.A. 18A:6-9,'" (Board of Education of the City of Newark v. Levitt, 197 N.J. Super. 239 (App. Div. 1984), quoting Hinfey v. Matawan Regional Board of Education, 77 N.J. 514, 525 (1978)), until such time as he is granted statutory authority or the imprimatur of the Courts of New Jersey to do so, the Commissioner declines to grant counsel fees. See also, Gibson v. Newark, rev'd/rem'd to State Board by Superior Court, Appellate Division, October 18, 1985, decided State Board May 7, 1986.

Accordingly, the instant Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 19, 1986
Pending N.J.Superior Court

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IN THE MATTER OF THE ANNUAL :
SCHOOL ELECTION HELD IN THE :
SCHOOL DISTRICT OF THE TOWN- : COMMISSIONER OF EDUCATION
SHIP OF SHAMONG, BURLINGTON : DECISION
COUNTY. :
:

The announced results of the balloting for two members of the Board of Education for full terms of three years each at the annual school election held April 15, 1986 in the School District of the Township of Shamong, Burlington County, were as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
James Skaggs, Jr.	282	0	282
A. Lois Graham	143	1	144
*Ann Wisnewski	83	0	83
*R. M. Gallagher	1	0	1

*Ann Wisnewski and R. M. Gallagher were write-in candidates. The 83 write-in votes cast for Ann Wisnewski listed on the Combined Statement of Result are only those votes which were cast in the appropriate slots according to the directions appearing on the voting machine. This number (83) does not include the write-in votes which were inappropriately cast appearing on lines 3 to 30 on the paper rolls.

Pursuant to a letter request from Lee B. Laskin, Esq. dated April 17, 1986, an authorized representative of the Commissioner of Education from the office of the Burlington County Superintendent of Schools was directed to conduct a recount of the ballots cast. The recount was conducted on April 29, 1986 at the superintendent of elections office on Eayrestown Road in Lumberton.

At the conclusion of the recount the tally stood as follows:

THREE-YEAR TERM	AT POLLS	ABSENTEE	TOTAL
James Skaggs, Jr.	282	0	282
A. Lois Graham	143	1	144
*Ann Wisnewski	83	0	83
*R. M. Gallagher	1	0	1

*There were 3 write-in names: Ann Wisnewski with 83 votes which were counted; R. M. Gallagher with 1 vote counted and Ken Ruhland whose vote was not counted due to his name not being written in the appropriate place.

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Although the recount results came out exactly the same as those listed on the Combined Statement of Result, there exists the question as to whether other votes cast for Ann Wisnewski, which were not written or pasted in the slots corresponding or opposite the office being voted for, should be counted. If they were, Ann Wisnewski would have received 97 additional votes for a total of 180 votes.

At the recount the following questions were asked by the Commissioner's representative of Mr. Jack Boldizar, the voting machine custodian:

1. Which lines on the machine were designated for the vacant 3 year terms?

   J. Boldizar: Lines 1 and 2

2. What other lines were to be used on these (Shamong's) machines and for what purposes?

   J. Boldizar: Line 3 was the explanation of the current expense proposition, line 4 was to vote YES and line 5 was to vote NO.

3. According to the instruction located on the machines, what lines should have been used to cast write-in votes?

   J. Boldizar: The release (write-in release lever) should have been pressed and the votes cast in lines 1 and 2.

4. Were all other lines locked?

   J. Boldizar: No, all lines below line 5 were open.

5. If one voted for both candidates printed on the ballot for the full three year term, can one also write or paste in names on lines 1 through 5?

   J. Boldizar: Yes

6. Can one write in a person's name in the slot by the question on current expense in the "YES" or "NO" slot if one did not vote "YES" or "NO" on the current expense question?

   J. Boldizar: Yes

7. Could one vote for the 2 candidates listed on the ballot, press the write-in release lever and write in 1 or more candidates' names on lines 3-50?

   J. Boldizar: Yes

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8. Is this normal procedure in all other elections, that those slots are not locked? (lines 5-50)

   J. Boldizar: Yes

9. What you are saying then is that, with these machines, one could vote for the 2 candidates printed on the ballot and also write in a 3rd, 4th or 5th person's name on lines 3 to 50?

   J. Boldizar: Yes

10. If one votes for one printed name on the ballot and writes in one person's name, does the slot for a write-in lock by the second printed candidate's name?

    J. Boldizar: Yes

11. What are the instructions in a general election as to how to write in a person's name? Are they the same as for school elections?

    J. Boldizar: Yes

12. Who conducts the training on the use of these machines?

    J. Boldizar: We do. (The Superintendent of Elections Office)

13. If one wanted to be trained on the operation of these machines and ask what votes should be counted, what would be your instructions?

    J. Boldizar: To cast a write-in vote the name must be opposite the office. (lines 1 & 2)

14. You would not count any write-in names on any other lines.

    J. Boldizar: No

15. Is this same procedure followed in the general elections?

    J. Boldizar: Yes

Questions asked of the board secretary:

1. Did you inspect the machines on April 10, 1986?

   Marilyn Prado: yes

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2. Did you find that the machines were in working order and satisfactory for the election?

   Marilyn Prado: Yes

Questions to the machine operators: Mrs. Lillian Gardner, Judge of elections, Nina King, Brenda Chappine and Laura King:

Note: All the above work in general elections.

1. What instructions did you give to help people who wanted to write in a person's name?

   Response: Read the instructions shown on the machine. If you then need assistance, ask for help.

2. Do you operate the machines in the primary elections?

   Response: Yes

3. Are your instructions for casting a write-in vote in the primary election the same as those in the school election?

   Response: Yes, they are told to read the instructions.

4. What are your instructions on which write-in votes you count and which ones you should not count?

   Response: The instructions given by Jack Boldizar (Machine custodian and also the one who would conduct training) were to count only the names opposite the 2 printed names on the ballot. It must be the full name (first and last); no other write-in names are to be counted.

   Once the questions were concluded, everyone was asked if they agreed to all the numbers read off the machines. Everyone was in agreement. Machine number 32786 was used to test the responses to the questions directed to the machine custodian, Jack Boldizar. His responses were accurate as to the operation of the machines.

   It was noted that on lines 13 and 14 there was a paste-on sticker with a dark bold arrow pointing downward with the words "write-in release lever." This lever must be pressed to the right before any of the write-in slots could be opened. It was found that this lever was not working when the machine was operated at the recheck. There was no complaint at the election about the lever not working.

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At the very upper left of the machines a card titled "Instruction for casting a write-in vote" was posted. (Exhibit 1) This card indicates that the write-in vote must be cast "on the line with the number corresponding to the number by the office for which you desire to write-in." There were no numbers on the machine.

A pamphlet titled "C.A.S.T." was distributed prior to the election and was submitted since it also gives instructions on how to cast a write-in vote. (Exhibit 2) Item 2 of this pamphlet gives the similar instruction as the card posted on the machine. It states, "Pull to right the window slide of the designated office for which you desire to cast your vote. Paper will then be exposed for your write-in vote."

The paper rolls were rechecked which revealed the following:

1. Ann Wisnewski received 97 votes on lines other than lines 1 and 2.

2. Four (4) votes were not counted because the full name was not listed.

3. One (1) vote was not counted because the name was listed twice.

4. There was a distinct pattern of write-in votes on line 13 throughout the paper rolls.

The question still remains: should the additional 97 votes for Ann Wisnewski be counted or should they be voided because they were not placed in their appropriate place on the machine?

In view of the above, the Commissioner's representative makes the following finding of facts:

1. The training that election workers receive from the county board of elections is to count only the write-in votes corresponding or opposite the office being sought.

2. The election officials received such instructions and the judge of elections in the Township of Shamong had these instructions reiterated by Mr. Jack Boldizar, custodian of the machines, and also one of the individuals who would have trained any person who would have expressed an interest in working the machines.

3. The instructions to election workers in the primary and general elections indicate that any write-in vote cast which does not correspond to the office shall not be counted.

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4. The instructions on the card posted on the machines (Exhibit 1) state that the write-in vote should be cast "in line with the number corresponding to the number by the office for which you desire to write-in."

5. The New Jersey Statutes Annotated (19:49-5) states that an irregular ballot (any person whose name does not appear on the machine as nominated candidate for office) must be cast in its appropriate place on the machine "or it shall be void and not counted."

6. Title 18A:14-42 states, "The voting machines shall be prepared for use and shall be used at such school election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes***."

7. The printed material distributed with the election material for general and primary elections by the county board of elections titled "Municipal Election Day Solutions, What to do" shows the same information for casting a write-in vote as the instruction card in the voting machines.

8. The voter could vote for both candidates for the full three-year term and also write in the same name or other names from line 3 to line 50 making it possible to inflate the count for one specific person or vote for more candidates than allowed.

The Commissioner's representative therefore concludes the following:

1. The voting machine officials and the election workers are trained and instructed not to count any votes other than those cast on the assigned lines.

2. The directions (Exhibit 1) posted on the voting machines instruct the voter to cast their write-in vote in the slot corresponding to the number by the office for which they desire to write in.

3. Title 19:49-5 states that the irregular votes are not to be counted in municipal elections if they are not cast in the appropriate slot.

4. Title 18A:14-42 states that the machines used in school elections will be operated in the same manner as in the general election.

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5. The write-in windows were not locked below line 5 therefore making it possible to vote for more than 2 candidates by voting for persons on the ballot and casting write-in votes.

The Commissioner's representative therefore recommends that any write-in votes inappropriately cast on lines 3 through 30 should not be counted.

* * * *

The Commissioner has reviewed the report of his authorized representative. In the Commissioner's judgment, the findings set forth in the report of the instant matter support those conclusions of law which rely upon the controlling statutory provisions of N.J.S.A. 18A:14-42 and N.J.S.A. 19:49-5 as amended. The expressed legislative mandate contained in these statutes is clear and unambiguous.

> N.J.S.A. 18A:14-42 reads in pertinent part as follows: The voting machines shall be prepared for use and shall be used at such election in the same manner, and the superintendent of elections or the county board of elections, as the case may be, and all election officers of the district shall perform the same duties, as are required when the same are used in elections held pursuant to Title 19, Elections, of the Revised Statutes***."

The controlling provisions of N.J.S.A. 19:49-5 as amended, read:

> Ballots voted for any person whose names does not appear on the machine as a nominated candidate for office are herein referred to as irregular ballots. Such irregular ballot shall be written or affixed in or upon the receptacle or device provided on the machine for that purpose. No irregular ballot shall be voted for any person for any office whose name appears on the machine as a nominated candidate for that office or for a delegate or alternate to a national party convention; any irregular ballot so voted shall not be counted. An irregular ballot must be cast in its appropriate place on the machine, or it shall be void and not counted.
>
> (emphasis added)

Any other reading or interpretation given to these statutes by the Commissioner in order to validate the 97 irregular ballots in question would be contrary to the expressed intent of their legislative enactment. It is determined therefore that the 97 write-in ballots in question may not be counted.

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Accordingly, the Commissioner affirms the report of his authorized representative and finds and determines that James Skaggs, Jr. and A. Lois Graham were elected to full terms of three years each on the Board of Education of the School District of the Township of Shamong.

The record of this matter shall immediately be transmitted to the Office of Administrative Law where an inquiry is pending into the allegations made by Ms. Wisnewski. The purpose of this transmittal is to supplement the record of the inquiry and to permit any responsive statements made by those persons at the time of the recount, which are contained in the report of the Commissioner's representative, to be subject to further inquiry under oath as deemed appropriate by the ALJ. This decision is binding upon the parties unless a contrary determination is rendered by the Commissioner upon receipt and review of the initial decision to be issued by the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 20, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6257-85
AGENCY DKT. NO. 328-9/85

BOARD OF EDUCATION OF THE BOROUGH OF KINNELON,
Petitioner
v.
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE,
Respondent

Thomas R. Curtin, Esq., for petitioner
(Curtin, Hubner & McKeon, attorneys)

Robert Greenwood, Esq., for respondent
(Greenwood & Sayovitz, attorneys)

Record Closed: April 2, 1986 Decided: April 4, 1986

BEFORE **WARD R. YOUNG, ALJ:**

The Kinnelon Board of Education (Kinnelon) alleged an indebtedness of $107,034.61 for 1983-84 tuition by the Riverdale Board of Education (Riverdale) and seeks declaratory judgment for same with interest.

Riverdale asserts that Kinnelon is not entitled to the tuition increase it seeks and also argues for dismissal due to alleged untimely filing of the petition pursuant to N.J.A.C. 6:24-1.2.

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The matter was transmitted to the Office of Administrative Law as a contested case on October 1, 1985 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on November 21, 1985 at which the parties agreed to submit the matter for summary decision. The failure of the parties to stipulate all relevant and material facts necessitated the scheduling of a plenary hearing, which was held on February 26, 1986. Post-hearing briefs were filed and the record closed on April 2, 1986, the date of final filing.

The issue of untimely filing shall be first addressed.

The actual date of the filing of Kinnelon's Petition for Declaratory Judgment could be disputed. Said petition was dated September 3, 1985 and the certification of counsel for Kinnelon indicates it was mailed on that date. The Petition was stamped in the Bureau of Controversies and Disputes on September 10, 1985 at 11:27 a.m. The acknowledged receipt of the petition was sent to counsel for the parties under date of September 30, 1985 by the Bureau Director, and indicates the filing dates of both September 5, 1985 and September 25, 1985. The acknowledged receipt of respondent's answer forwarded to counsel also under date of September 30, 1985 by the Bureau Director indicates said answer was filed on September 24, 1985. It therefore appears likely that the correct date of filing with the Commissioner was on September 5, 1985. Nevertheless, I **FIND** the precise date of filing to be irrelevant and adopt as a **FINDING OF FACT** that Kinnelon's Petition for Declaratory Judgment was filed with the Commissioner sometime during the month of September in the year 1985.

The Kinnelon brief states under Statement of Facts at paragraph 7 on page 3:

> On April 19, 1984, for the first time, the Riverdale Board of Education advised the Kinnelon Board of Education that they would not pay the additional tuition charge at any time, despite the willingness of the Kinnelon Board to permit installment payments. [See P-4]

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Kinnelon argues it seeks the difference between tuition payments made by Riverdale for the 1983-84 school year and the actual tuition costs for that year as determined by the State audit, which was not received until July 3, 1985, and that its Petition for Declaratory Judgment was filed within 90 days from that date. It further argues that lack of the specific tuition costs pursuant to the audit would promote premature litigation and seeks relaxation of the 90-day rule as Riverdale was not prejudiced by the delay.

The gravamen of the dispute of untimeliness is whether the cause of action occurred upon the April 19, 1984 Riverdale communication (P-4) that they would not pay any additional 1983-84 tuition charge at any time because a change in tuition policy during the course of a school year without prior notice is unlawful, or upon the July 3, 1985 receipt of the State audit.

It is undisputed that 1983-84 estimated tuition costs were based on the past practice of a 7% increase over costs of two years previous (1981-82 in this instance), and that in November 1983, Kinnelon noticed Riverdale of its change in policy which would impact on its 1983-84 costs. I FIND, therefore, that Kinnelon sought the difference in tuition payments between its new policy and the former agreement, notwithstanding that audited costs may require a later adjustment.

I FIND the cause of action in this dispute to have occurred on April 19, 1984.

N.J.A.C. 6:24-1.2 states:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. . . .

The filing of timely appeals has been addressed by the Commissioner and the Courts on numerous occasions, and it is now well established that relaxation of the

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requirements of N.J.A.C. 6:24-1.2 pursuant to N.J.A.C. 6:24-1.19 is to be sparingly exercised. The New Jersey Supreme Court stated in Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn. 79 N.J. 311 at 327, n.4 that "A teacher who proceeds to advisory arbitration is not relieved from compliance with this 90-day filing requirement" [N.J.A.C. 6:24-1.2]. See also Riely v. Hunterdon Central Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

The 90-day filing time in this matter expired on July 18, 1984. Giving Kinnelon the earliest filing date of September 5, 1985, I **FIND** the petition to have been filed 504 days after the cause of action, or 414 days after the expiration of the 90-day period pursuant to N.J.A.C. 6:24-1.2, and therefore **FIND** said filing to be untimely.

I **CONCLUDE**, therefore, that the Petition for Declaratory Judgment shall be and is hereby **DISMISSED. IT IS SO ORDERED.**

In light of the determination herein, I **FIND** no compelling need to address the substantive issue.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby FILE this Initial Decision with **Saul Cooperman** for consideration.

4 April 1986
DATE

WARD R. YOUNG, ALJ

APR - 9 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

APR 9 1986
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BOROUGH OF KINNELON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions first set forth for the record its version of the facts in the instant matter, which is summarized below:

> The Kinnelon Board of Education and the Riverdale Board of Education were parties to a sending/ receiving relationship which was formalized by a contract which expired. That contract provided for the method of calculating the tuition to be paid by Riverdale and contained a provision that extended the contract for one (1) year if the parties were unable to come to a resolution. The Kinnelon Board of Education attempted to resolve the overall sending/receiving relationship problem during the years 1981, 1982, 1983 and 1984. In fact, that litigation was tried by Judge Young; later decided by the Commissioner; later went to the State Board; and later went to the Appellate Division. The case was remanded on at least one occasion, and the ultimate decision permitted Riverdale to withdraw its seventh and eighth grade students. During that period, Kinnelon was losing funds annually because Riverdale would not agree to a new formula, nor would they agree to a new contract. In 1981-82, Riverdale paid $98,667 less than the actual tuition costs which were incurred. In 1982-83, Riverdale paid $105,553 less than the actual tuition costs.

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Prior to the 1983-84 school year, and during the budget development stage, Kinnelon provided Riverdale with a tentative tuition rate for the 1983-84 school budget. In November of 1983, Kinnelon advised Riverdale that the actual cost for 1983-84 would exceed the tentative tuition figures. Kinnelon further advised that its tuition base would be in accordance with the State Department of Education formulas.

On December 20, 1983, committees of both Boards met to discuss the possibility of a successor agreement and to work out a payment schedule for Riverdale to pay the increased tuition expenses over several years.

The Riverdale Superintendent wrote to Assistant Commissioner Calabrese on February 8, 1984 seeking a determination as to the appropriateness of the new tuition rates established by Kinnelon.

Assistant Commissioner Calabrese, by letter of February 29, 1984, told the Riverdale Superintendent that he had determined that Riverdale would not be obliged to begin payments on the increased tuition charges until they had a chance to budget for them. The Assistant Commissioner further concluded that fifty (50%) percent would be due in 1984-85, and the balance in 1985-86. The Assistant Commissioner affirmed Kinnelon's position as to the right to receive additional tuition monies based upon actual student costs.

On April 19, 1984, the Riverdale Superintendent advised Kinnelon that they would not pay the additional tuition charges at any time, despite the liberal payment terms offered by Kinnelon.

During the Spring, Summer and Fall of 1984, Kinnelon and Riverdale continued their negotiation and eventually arrived at a sending/receiving agreement but could not agree on the payments for the 1983-84 school year. Riverdale knew that that issue was still in dispute by virtue of oral communication and written correspondence between the Kinnelon Board Secretary and the Riverdale Board of Education.

In order to avoid any further dispute, Kinnelon awaited the results of the tuition audit by Assistant Commissioner Calabrese for the 1982-83

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school year and the 1983-84 school year. As a result of that audit, the difference between the amount paid by Riverdale for the 1983-84 school year and the amount owed for that period was $107,034.61.

This litigation commenced within ninety (90) days of the date of the notification to Kinnelon that its 1983-84 budget figures were in fact correct.

This matter was pre-tried, and a hearing conducted. Briefs were submitted by the parties. Riverdale does not deny that they paid $107,034 less than they were obligated to do. They contend that [Kinnelon] had no right to bill them during that period and insisted that [Kinnelon] had to notify them prior to the 1983 school year before making any adjustment; and they further relied upon N.J.A.C. 6:24-1.2.

They do not claim any prejudice by virtue of the filing of this petition in September of 1985. Judge Young, in his decision, dismissed the petition based upon the provisions of N.J.A.C. 6:24-1.2 and did not, in his decision, discuss or decide the merits of the claim brought by the Kinnelon Board of Education.

(Petitioner's Exceptions, at pp. 2-4)

As its prayer for relief, the Kinnelon Board of Education asks that the Commissioner, in order to assure that justice and fairness prevail, relax the strict requirements of N.J.A.C. 6:24-1.2 and consider the merits of the issue. Specifically, petitioner asks for a determination as what to the tuition indebtedness of respondent to petitioner is, if indeed it is owing at all and, if so, the due date or dates of same.

Petitioner cites Gincel v. Edison Board of Education, 1980 S.L.D. 943, aff'd State Board 953 for the proposition that the 90-day rule may be relaxed in the interest of justice and where the responding party is not prejudiced by the delay. Petitioner avers that respondent has not only not been prejudiced by the delay, but has benefitted by it by having time to save and/or budget for the actual amount of funds due to petitioner. Petitioner also cites Parisi v. Asbury Park Board of Education, decided by the Commissioner January 23, 1984, State Board rev'd and rem'd October 24, 1984, decided by the Commissioner on remand, February 25, 1986, for the proposition that relaxation of the 90-day rule is appropriate where strict adherence to the rule would promote premature litigation. Petitioner contends that while the dispute between the two Boards to pay the actual tuition may have arisen prior to 90 days from the filing of the Petition of Appeal, the amount in controversy

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could not be established until the tuition order was received in July 1985. "Had Kinnelon filed its claim within ninety days of April 19, 1984, no decision could have been made in this case until the final audit was conducted to determine whether the facts were or were not correct." (Petitioner's Exceptions, at p. 4)

Petitioner contends that if the Commissioner affirms the ALJ's determination, it will have a severe impact upon Kinnelon, and it would permit "unfair dealing by Riverdale." (Petitioner's Exceptions, at p. 4) Petitioner requests that in the interest of justice and where no prejudice has been shown, the Commissioner not adopt the findings of the ALJ but, rather, reverse the matter, instruct the ALJ to reach the issue that is in dispute with the parties, and permit a full and fair adjudication of this issue by the Commissioner.

Respondent's reply exceptions aver that the instant matter is not one that was disposed of by motion or on technical procedural grounds, but rather that the initial decision was rendered following a full hearing in which all facts were adduced relating to both the merits of the case and the timing of the Petition of Appeal. Respondent recites for the record its counterstatement of the facts, as it views them, which is summarized below:

> The case involved a claim by Kinnelon for extra tuition for the school year 1983-84 for pupils sent to its schools by Riverdale. Kinnelon's claim is based entirely on its assertion that it may legally change the basis or method upon which it had been charging tuition over the preceding seven years by sending a notice of such change during the school year for which the change was to become effective. Specifically, Kinnelon sought to collect extra money for 1983-84 by sending its first actual notice of change of manner of calculation of tuition in a letter dated November 15, 1983. This notice came many months after Kinnelon had told Riverdale to budget for 1983-84 on the basis of the practice that had been followed between the districts for the preceding seven years and many months after Riverdale, accepting such figures, had budgeted tuition for the 1983-84 school year.
>
> On the basis of the November 15, 1983, letter and subsequent negotiations, the two boards of education did agree to a new basis for tuition calculated for the years following 1983-84. Riverdale recognized the right of a receiving district to set tuition changes prospectively in accordance with State statutes and regulations.

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> But Riverdale, after consulting with its legal counsel, respectfully but very specifically refused to acquiesce in the entirely new method of tuition calculation for 1983-84.
>
> (Respondent's Reply Exceptions, at p. 2)

Respondent cites Board of Education of the City of Burlington v. Board of Education of the Township of Edgewater Park, Burlington County, 1974 S.L.D. 692 for the proposition that a change in tuition policy may not be made during the course of a school year without prior notice.

Respondent takes issue with petitioner's statement that "because Riverdale would not agree to a new formula, nor would they agree to a new contract" Kinnelon was losing funds prior to 1983-84. (Respondent's Reply Exceptions, at p. 2) Respondent contends that there was no overture by Kinnelon to change the established tuition formula nor to create a new one prior to the letter notice of November 15, 1983, and that there was consequently no refusal on the part of Riverdale to agree to a new formula or contract. Respondent further argues that any discrepancies between tuition charges and formula costs to Kinnelon for years prior to 1983-84 were not communicated to Riverdale prior to this matter and are not sought in this litigation.

Respondent takes issue with petitioner's assertion that it provided Riverdale with a tentative tuition rate for 1983-84. Respondent avers that the way rates for tuition had been set in years before was by means of a specific and determined formula. Petitioner cannot suddenly label those rates for 1983-84 as "tentative."

Further, respondent takes issue with petitioner's assertion that Assistant Commissioner Calabrese ruled that tuition was due but not payable until two years after 1983-84. Respondent avers that Mr. Calabrese did not render a reasoned legal opinion in his correspondence dated February 29, 1984 and was not given all the operative facts. Thus, respondent argues, Mr. Calabrese's brief correspondence on this point cannot answer the question here in litigation.

Further, respondent recites that on page 3 of its exceptions, petitioner stated that "Riverdale does not deny that they paid $107,034 less than they were obligated to do." Respondent argues that Riverdale does indeed deny any such obligation. It contends that it is not obligated to pay the claimed tuition because petitioner changed the method of calculation by which tuition was to be assessed in midyear, which was contrary to its agreement and past practice with Kinnelon, and thus created no obligation for Riverdale to pay the increase.

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Citing North Plainfield Education Association v. Board of Education of North Plainfield, 96 N.J. 587 (1984), Board of Education of Bernards Township v. Bernards Township Ed. Assoc. et al., 79 N.J. 311 (1979) and a panoply of other school law decisions on point, respondent contends that the Commissioner and the courts have taken the 90-day rule seriously and have applied it rigorously. Respondent contends that in the present matter the 90-day rule was plainly violated. Since the petition was not filed until September 5, 1985, respondent avers that the filing exceeded the time limit by 414 days. Respondent argues that audit figures provided at some later date have nothing to do with the basic issue as to whether a receiving district may effectively change the basis for establishing tuition rates during the school year for which the change in tuition is sought. Further, since the ALJ knew all the facts and arguments and determined that the time limit rule should not be relaxed, his determination is entitled to great weight, avows respondent. Respondent contends that Kinnelon has presented nothing to show that the ALJ's determination was in error. Further, respondent argues that there is prejudice to Riverdale if the 90-day rule is relaxed. Respondent contends it is inappropriate for it to be burdened with litigation and with any potential expense -- for litigation or tuition -- for a claim so far out of time.

Lastly, respondent would take issue with the comment of petitioner at page four of its exceptions that the initial decision has a "severe impact on Kinnelon, and it permits unfair dealing by Riverdale." Respondent strongly contends that there is not a hint of "unfair dealing" in this case. Respondent suggests that it should be remembered that petitioner's letter of November 15, 1983 was the first notice of dissatisfaction with the long-established pattern of tuition determination. Further, respondent suggests there is no "severe impact on Kinnelon." Respondent contends Kinnelon budgeted to receive the amounts it had told Riverdale to raise. These amounts were paid, argues respondent, and are not in dispute in the current litigation. What Kinnelon is belatedly seeking, avows respondent, are extra tuition payments based on an entirely new method of tuition calculation announced during the 1983-84 school year. This, in respondent's opinion, would amount to a windfall for petitioner.

Respondent prays that the Commissioner approve and adopt the initial decision as his own.

Upon review of the record in this matter, the Commissioner rejects the recommended decision of the Office of Administrative Law for the following reasons.

For the record, the Commissioner sets forth the following sequence of events:

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1976-Oct. 1, 1980	Five-year agreement between Riverdale Board of Education and Kinnelon Board of Education permitting seventh through twelfth grade students of Riverdale to attend Kinnelon schools.
October 1, 1980	One-year extension of agreement. Riverdale students attend Kinnelon on basis of estimated tuition.
1982-83	No new agreement reached.
Fall 1983	Before school year started, Kinnelon provided Riverdale with tentative tuition rates for the 1983-84 year.
November 15, 1983	Kinnelon advised Riverdale that actual costs would exceed tentative figures and allowing for a schedule for payment of increased amount. (See Petition of Appeal, Exhibit A.)
February 8, 1984	Riverdale wrote Assistant Commissioner Calabrese seeking determination as to the "appropriateness" of Kinnelon's revised tuition rates. (See Exhibit B.)
February 29, 1984	Assistant Commissioner Calabrese, by letter, replied to Riverdale's February 8, 1984 correspondence stating that since Riverdale had not been apprised until November of the tuition increase, Riverdale would not be obligated to begin payment or any increase in tuition charges until Riverdale had had an opportunity to budget for the increase. Assistant Commissioner Calabrese made no comment as to the amount to be charged, but rather slated a tuition audit to facilitate making a determination as to the amount of tuition, if any, actually due Kinnelon. (See Exhibit C.)
April 19, 1984	Riverdale Superintendent advised Kinnelon in writing that it would not pay additional tuition since inadequate notice was provided. (See Exhibit D.)

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July 3, 1985	Assistant Commissioner Calabrese advised Kinnelon of the results of audit for tuition due for 1982-83 and 1983-84 school year from Riverdale indicating that the difference between the amount paid by Riverdale for 1983-84 school year and the amount owed for the same period totaled $120,154. (See Exhibit E.)
September 5, 1985	Kinnelon filed Petition of Appeal with Commissioner of Education praying for relief in the amount of $120,154 from Riverdale for tuition due it.

Having carefully studied the record in this matter, it is clear to the Commissioner that two separate issues are involved in calculating from what date the 90-day rule, N.J.A.C. 6:24-1.2, should be applied. The first cause of action arose in November 1983, when Kinnelon submitted to Riverdale adjusted tuition rates, which were presented for immediate payment on an installment basis by Kinnelon. Whether or not Riverdale should have been required to begin making payments of the amount required by Kinnelon was indeed a matter that could have, and perhaps should have, been posited for the Commissioner's consideration by way of a Petition of Appeal submitted by Kinnelon at the time that it learned, on April 19, 1984, that Riverdale refused to do so.

Instead, Riverdale chose, by letter dated February 8, 1984 (copy to the Kinnelon Board), to request a determination from Assistant Commissioner Calabrese's office as to the "appropriateness" (see Exhibit B) of Kinnelon's altering the tuition formula and requiring payment of an increased amount midyear. Assistant Commissioner Calabrese's reply correspondence of February 29, 1984 made it entirely clear that, without allowing adequate time for Riverdale to budget for such an increase, it would be inappropriate for any such payment to be made. (See Burlington, supra, at pp. 704-705.) It is also entirely clear from Assistant Calabrese's correspondence that the second issue, that is, exactly what amount, if any, Kinnelon was due, could not be determined without an audit. Mr. Calabrese's letter of the same date arranged for such an audit.

Receipt of the results of that tuition audit, which both parties received on or about July 3, 1985, precipitated Kinnelon's filing a Petition of Appeal on September 5, 1985, well within 90-days of its learning of the amount actually due and payable by Riverdale. The Commissioner finds that it was upon receipt of Assistant Commissioner Calabrese's audit and letter dated July 3, 1985 that N.J.A.C. 6:24-1.2 was properly triggered. Thus, the Petition of Appeal was timely filed.

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Since Riverdale itself requested advice from Assistant Commissioner Calabrese as to what amount was due and precisely when such amount, if due, was payable, its good faith cannot be gainsaid. Further, its immediate request for advice from the Department's Office of Finance can leave no doubt as to its appreciation of the import of its obligation to pay whatever amounts were due. Further, an injustice would result to Riverdale if Kinnelon could require payment from Riverdale before the amount due was verified by the Division of Finance.

Similarly, Kinnelon's filing of its Petition of Appeal could not have been undertaken any earlier, in the Commissioner's opinion. To hold otherwise would create an injustice to that district, which waited until the exact amount due and payable was determined before filing with the Commissioner for a decision on the merits.

Accordingly, the Commissioner rejects the recommended decision of the Office of Administrative Law. The Commissioner finds and determines that the Petition of Appeal in the instant matter was timely filed pursuant to N.J.A.C. 6:24-1.2. Further, the Commissioner directs respondent, Riverdale Board of Education, to pay petitioner the sum of $120,154, representing the difference between the tuition paid by respondent and the actual tuition costs as established by the state audit in this matter for the 1983-84 school year.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 22, 1986

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BOARD OF EDUCATION OF THE BOROUGH :
OF KINNELON,

PETITIONER-APPELLANT, :

V. : STATE BOARD OF EDUCATION

BOARD OF EDUCATION OF THE BOROUGH : DECISION
OF RIVERDALE, MORRIS COUNTY,

RESPONDENT-RESPONDENT. :

:

Decided by the Commissioner of Education, May 22, 1986

For the Petitioner-Respondent, Curtin, Hubner and McKeon
(Thomas R. Curtin, Esq., of Counsel)

For the Respondent-Appellant, Greenwood and Sayovitz
(Robert Greenwood, Esq., of Counsel)

We affirm the Commissioner's determination that the claim in this case was not time-barred by N.J.A.C. 6:24-1.2. We however find that resolution of the merits of this case requires a determination of whether the tuition rates for 1983-84 provided by Kinnelon to Riverdale prior to the school year were tentative tuition rates within the meaning of N.J.A.C. 6:20-3.1(d) (1983) (amended 1984, 1985). Because the Commissioner did not address this issue, we remand the matter to the Commissioner of Education.

October 1, 1986

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BOARD OF EDUCATION OF THE BOROUGH OF KINNELON,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF RIVERDALE, MORRIS COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION ON REMAND

For the Petitioner, Curtin, Hubner & McKeon
(Thomas R. Curtin, Esq., of Counsel)

For the Respondent, Greenwood & Sayovitz
(Robert H. Greenwood, Esq., of Counsel)

This matter comes before the Commissioner by way of remand from the State Board of Education wherein it required the Commissioner to determine "whether the tuition rates for 1983-84 provided by Kinnelon to Riverdale prior to the school year were tentative tuition rates within the meaning of N.J.A.C. 6:20-3.1(d) (1983) (amended 1984, 1985)." (State Board Decision, October 3, 1986)

It is noted that a letter received by the Commissioner on November 5, 1986, dated November 4, from Robert H. Greenwood, Esq. indicates as follows:

> "I am writing to express my agreement with my adversary that there is a sufficient record before you to make the decision required under the Board directive. Since the record is complete, it is in the interest of all parties to have the matter resolved by you without further time and expense that would be required if the matter were further remanded back to the Office of Administrative Law."

The Commissioner concurs with this suggestion from counsel and incorporates said correspondence into the record by reference.

In accord with the demand, the Commissioner determines, as pointed out on page 15 of his decision, that the tuition rates established by Kinnelon to Riverdale prior to the onset of the 1983-84 school year were tentative tuition rates for that year. The Commissioner concurs with this suggestion from counsel and incorporates said correspondence into the record by reference.

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However, the Commissioner further finds and determines that the tuition rates established by the Division of Finance in its formal audit dated July 3, 1985 (Exhibit E) were not tentative tuition rates, but rather, in accord with N.J.A.C. 6:20-3.1(d) represent the final amounts due and payable by Riverdale to Kinnelon for the periods in question.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

NOVEMBER 25, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3505-85
AGENCY DKT. NO. 143-5/85

WASYLINA (MARIE) ONULAK,
Petitioner,
v.
METUCHEN BOROUGH BOARD OF EDUCATION,
Respondent.

Stephen E. Klausner, Esq., for petitioner (Klausner & Hunter, attorneys)

Anthony M. Campisano, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: February 20, 1986 Decided: April 4, 1986

BEFORE DANIEL B. MC KEOWN, ALJ:

Wasylina (Marie) Onulak (petitioner), employed by the Metuchen Borough Board of Education (Board) as a custodian, claims to have suffered a personal injury arising out of and in the course of her employment which resulted in her absence from such employment and that the Board refuses to afford her salary benefits under N.J.S.A. 18A:30-2.1 and that it improperly charged her sick day bank for absences due to such injury. The Board denies petitioner's factual allegation and, as separate defenses, claims the Commissioner lacks jurisdiction to hear this matter and that in any event petitioner's claims, filed on May 28, 1985 before the Commissioner of Education, are barred by the doctrines of laches, estoppel and waiver. After the Commissioner of Education transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was conducted August 19, 1985 during which it was agreed, among other things, that a hearing would commence

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October 3, 1985. Because of the unavailability of witnesses for the Board, the hearing was rescheduled and conducted November 25 and 26, 1985 at the North Brunswick Municipal Building, North Brunswick. Upon receipt of the Board's response on February 19, 1986, to petitioner's reliance upon a recently decided case by the Commissioner, the record in the matter closed.

BACKGROUND FACTS AND ISSUE

Background facts not in dispute between the parties except as otherwise noted are these. Petitioner as described in one medical report in evidence is "* * * a markedly obese 63 year old Caucasian female, who stands 65" tall, and weighs 220 lbs., which is 90 lbs. above ideal body weight of 130 lbs. for her height * * *." (C-5). The evidence shows petitioner has a history of suffering from low back pain. Petitioner claims that on February 15, 1985 while engaged in the performance of her duties as custodian, which employment she held with the Board for 12 years, she was pushing cafeteria tables to the wall to clear the area for pupil use the next day. While doing so petitioner says she felt something "snap" in her back. She finished work that day, reported for and completed work the following day, and has not returned since because of continuous low back pain. Petitioner claims the Board improperly denied her benefits under N.J.S.A. 18A:30-2.1 which provides, in part, as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave [of such employee] * * *

Two physicians, Drs. Andrew L. Hahn and Bernard Sandler, testified on behalf of petitioner that based upon what she told them in June and July 1985, respectively, of the incident which was to have occurred February 15, 1985 and in light of her medical history, Dr. Hahn's opinion is that petitioner suffers from low back strain syndrome which has become chronic (C-6, at p. 16) while Dr. Sandler's opinion is that petitioner suffers from trauma superimposed on lumbar osteoarthritis. Dr. Sandler testified that the trauma is attributable to petitioner's attempts to push cafeteria tables on February 15, 1985. Dr. Steven A. Frank, who testified for the Board, implies that petitioner did not suffer an injury arising out of and during the course of her employment on February 15, 1985 which

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resulted in her continuing lower back pain. While Dr. Frank could offer no objective medical evidence that the incident of February 15, 1985 as described by petitioner did not occur and it is noted that neither could Drs. Hahn or Sandler offer such evidence that it did occur, Dr. Frank is of the opinion that petitioner's lower back pain is due to chronic degenerative disease or chronic osteoarthritis, a wear and tear of the bone and spine aggravated by petitioner's age and obesity.

Thus, the issue to be decided is whether petitioner shows by a preponderance of credible evidence that on February 15, 1985, she suffered a personal injury caused by an accident arising out of and in the course of her employment which would entitle her to full salary or wages for the period of such absence for up to one calendar year without having such absence charged to her annual sick leave or to her accumulated sick leave. The evidence discloses that while petitioner's last actual working day was February 16, 1985, she was paid through March 15, 1985 and that the Board charged her available sick time for the payment of salary so received.

PROOFS OF THE PARTIES

Petitioner testified that on February 15, 1985 at about 2:45 p.m., she was engaged in the weekly Friday activity of pushing cafeteria tables to the wall to clear the area for Saturday activities. Another custodian who assists her in this task was on this day otherwise engaged putting the garbage out and not available to assist her. Petitioner explained that as she was pushing a particular round cafeteria table which she says is about 10 feet long and weighs 150 pounds and is large enough to seat eight pupils, the table got stuck on what she believes to be gum on the floor. At that precise moment, petitioner testified she felt something snap in the lower right side of her back, followed by a hot sharp pain.

Petitioner testified she immediately went to the nurse's office but the nurse was not present. Petitioner then met her supervisor, Robert J. Skolsky, the head custodian, in the hallway. Petitioner explains she told him she could not report to work the following day, Saturday, because she hurt her back. She asked him to file an accident report for her. Petitioner says Mr. Skolsky replied he would not file the accident report for her because he was going home at 3:00 p.m. In addition, petitioner testified Skolsky told her she had to report to work the following day because he did not have enough time to get a substitute for her. Finally, petitioner testified that Skolsky advised her that

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when she reported for work in the morning not to do anything, simply open the door to the school. Petitioner remained on duty February 15, 1985, until her regular time of 3:00 p.m. at which time she drove herself home, laid down on a couch, ate dinner and then went to bed where she remained until the following morning.

Skolsky testified to the contrary that on February 15, 1985 at approximately 1:40 p.m. he was in the boiler room at his desk. Petitioner appeared at that time and stated she wanted to go home early because she did not feel well which, according to Skolsky, was her sole reason for wanting to leave early. Skolsky testified petitioner made no mention of her back or of pushing cafeteria tables. Skolsky testified they talked for 10 to 15 minutes during which petitioner did not volunteer the cause of her not feeling well nor did he inquire of the cause. He did testify she stood during the entire conversation and that she did not appear distressed. Skolsky testified he replied that if she went home sick that day he would get a substitute for her on Saturday because he needed to be certain someone was present because of pupil activities. Saturday, it should be noted, was an overtime day for salary purposes for custodians. Petitioner refused that condition and did not then go home early. Skolsky is certain that petitioner requested approval for early departure at 1:40 p.m., not 2:45 p.m., because he explains when anyone asks to go home early, he always looks at the clock and writes the time down which custom he followed on this occasion. Skolsky testified that he gave that writing to the Board's business administrator. Petitioner, it is noted, did not demand production of the writing by the Board. Moreover, Skolsky testified that when custodians are obligated to push cafeteria tables off to the side for pupil activities the following day they begin doing so at about 1:09 p.m., the end of the regular pupil lunch periods. Finally, Skolsky testified that the cafeteria tables weigh approximately 40 pounds each, not 150 pounds, and are pushed to the wall by the custodians, not carried. Skolsky testified that the school nurse leaves the building at approximately 2:45 to 2:50 p.m. each day.

Petitioner testified she drove to work the following day, February 16, 1985, and reported at 7:00 a.m. Petitioner cannot recall if she drove the family Cadillac or Chevrolet Blazer to school. She opened the door but did not do much the rest of the day because the school had been cleaned the prior evening. Petitioner explained that after the pupils leave, custodians are obligated to pick up papers which may have been strewn about. Petitioner did push such papers with a dry mop into a corner near a garbage can. Petitioner explains she spent most of the day in the teachers' room on a couch. Periodically, however, she would walk to the corridor to check on noise being made by

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door openings. Petitioner explained that during this day, her back became worse and she had to lean on the wall to walk. She left at 3:30 p.m., got into her car which was parked approximately ten feet from the school exit, and drove herself home.

Petitioner testified no other custodians were present February 16, 1985, except Skolsky who, she says, came into the building at approximately 8:00 a.m. to check the boiler. Though petitioner passed Skolsky in the corridor, she did not speak with him. Petitioner admits having received approval on prior occasions to leave work early because her husband was ill or to pick up her son who is blind at some location to be driven home. Petitioner explains that on this day, February 16, when she saw Skolsky at 8:00 a.m. she did not ask to go home early despite her back pain because she did not get along with him and she reasoned, she says, if she did ask to go home early Skolsky would have refused the request. Despite that view, however, petitioner testified she did not care if Skolsky saw her lying down on the teachers' lounge couch because of the fact she was ill.

Petitioner admits having suffered a back injury on a prior occasion when, she says, she was required to use a buffer to wax school floors. Curiously, during discovery of this matter, petitioner responded "not applicable" to the interrogatory which made inquiry of petitioner as to any preexisting injury or disease.

Petitioner testified that when she left work at 3:30 p.m. she drove herself home, got in bed where she remained until the following Monday morning.

Skolsky testified that on February 16, 1985, he did go to the school between 10:00 and 11:00 a.m., not 8:00 a.m., to check the boilers. Skolsky saw petitioner in the hall and from his observation she was walking normal or, as he explained, as she always walks. There was no communication between Skolsky and petitioner that Saturday.

Frank Mamora, a maintenance handyman employed by the Board, testified that on February 16, 1985 at about noontime, he observed petitioner outside the back of the school by the boiler room and maintenance garage. Mamora testified he observed petitioner washing "* * * the truck or Bronco, whatever * * *". Mamora testified he observed petitioner with a bucket and a brush on a long handle. He said nothing to petitioner at that time. He cannot recall what the outside temperature was. Petitioner's son testified, to the contrary, that on February 16, 1985, he used the family Blazer to go skiing in the Poconos. The reason he is certain that he used the Blazer that day is because

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of the several family vehicles "* * * that's [the Blazer] is the only vehicle I can put my skis on * * *" (2T-77).

Petitioner testified that her son drove her to a chiropractor on Monday. Petitioner testified that she did not report to work that day because it was a legal holiday and no one was expected to work. Skolsky, to the contrary, testified that petitioner and other custodians were expected to report to work that Monday but that petitioner called in sick, as she did the following day, Tuesday. Petitioner testified that on Tuesday, February 19, she informed R. Zmijewski, the supervisor of custodians, of the incident which allegedly occurred to her on Friday and she further reported that Skolsky refused to file a report on her behalf. Petitioner testified that Zmijewski responded he understood because "he knows the problem."

Petitioner testified she was treated by the chiropractor that week and, according to the evidence of record, she was then admitted to the John F. Kennedy Medical Center on February 25, 1985, not February 22, 1985 as she testified, where she remained until March 9, 1985. According to the hospital discharge summary (C-6, at p. 11-12) signed by "R. Shah, M.D.", the discharge diagnosis of petitioner is that she suffers from low back pain syndrome, hypertension, urinary tract infection with E. coli. According to the reported history set forth in the hospital summary, petitioner

> * * * was admitted [on February 26, 1985] through the J.F.K. Medical Center Emergency Room because of complaints of progressively increasing pain in the low back area. The patient was apparently well until 2/15/85 when she hurt herself while moving many tables in the school where she works. Apparently the pain was not that bad at the time and the patient went home. Progressively the pain got worse in the lower back area and radiated into both legs, more on the right than the left. The patient went to a chiropractor for a few treatments, however, the teatments (sic) sid (sic) not help. Her pain became worse, she became bedridden and therefore she came to the Emergency Room at my request and was admitted for treatment and evaluation. There is no history of any other previous injury to the back or direct trauma to the lower back area. The patient had a similar problem in the past, but the pain was not as bad as it was (sic) now. Patient has known hypertension and was treated in the past for hemorrhagic cystitis by Dr. Lind and myself.

Dr. Shah's diagnosis of petitioner's complaints upon admission based on her statements to him was that she was suffering low back pain syndrome, possible herniated

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lumbar disc disease, hypertension by history and obesity. During her hospitalization Dr. Medina, a consulting orthopedic physician, recommended ultrasound be administered petitioner to her lower back area together with hot packs. Physical therapy was recommended and her condition stabilized. Petitioner ambulated with a walker and was thereafter discharged to be followed by outpatient physical therapy. Dr. Shah relates in the discharge summary various tests which were administered petitioner during her hospitalization which, in turn, provided the basis for him and Dr. Medina to rule out " * * * herniated nucleous pulposus L4-5 and L5-S1 with radiculopathy * * *".

Petitioner testified she feels better now than she had earlier, although she testified she still uses a cane to walk. She goes up and down stairs although her back still hurts and the pain extends down into her right leg. She has muscle spasms in the lower back three or four times a day. Petitioner testified her husband does most of the housework. Petitioner, in response to an inquiry whether she was willing to presently return to work, testified "if you want me returned to work, I'll try -school system is heavy work."

The day before petitioner's hospitalization February 26, 1985, some communication had to be given the Board secretary by her because on that date, February 25, 1985, the Board secretary wrote a letter reproduced here in pertinent part:

> I have received your Authorization For Absence dated 2/25/85, indicating that you will be unable to perform your regular work duties for a period of from four-to-six weeks. I am sorry to learn that you are not feeling well.
>
> Inasmuch as no accident report has been filed, nor any report made to Mr. Skolsky or Mr. Novak, I conclude that the injury was not sustained on the job. Should such not be the case, an accident report form must be filed with the high school nurse immediately, and you must arrange to be examined by our Workman's Compensation Physician * * *
>
> (C-1)

On the same date, February 25, 1985, the Board secretary sent petitioner a memorandum by which she was advised that because her absence from her duties would be for more than one week, she may not return without first producing a physician's note covering the period of absence and certifying her ability to resume her normal duties. (C-5). On March 14, 1985, the Board secretary sent the following letter to petitioner:

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I am writing in order to obtain clarification concerning your absence from work from February 19, 1985 through the present. The Authorizations for Absence dated 2/18/85 and 2/25/85 which you submitted are not sufficiently detailed to permit us to determine whether your expected protracted absence from your duties is appropriate for the circumstances.

Therefore, I am requesting that you contact any and all doctors from whom you have received treatment in this regard, and authorize them in writing, to release to our school physician full particulars concerning your condition through the present time. Failure to do this might be viewed as your unauthorized absence from work.

I must also point out that your accident report of the 2/15/85 incident was not delivered to my office until March 12, 1985, at which time it was promptly forwarded to our insurance carriers. However, it has not yet been determined whether this is an approved Compensation Claim, and one of the determinants of that decision, as I mentioned to you in my letter of February 25, will be the results of your being examined by our Workman's Compensation Physician. The insurance company will contact you in this regard.

In the meanwhile, my office continues to receive inquiries from treatment facility's credit departments and physician's bills, all of which suggest that they believe that this is an approved Workman's Compensation Claim, which it is not, as of this date. An example is a claim from Dr. Shah, received this morning, in the amount of $515.00. In fact, Dr. Shah identifies it specifically as a compensation claim. On the claim form, he indicates that you have never had the same or similar symptoms. Yet, our records indicate otherwise. Also, when you spoke with me by telephone on February 21, you said that you had experienced trouble with your back for many years. The confusion surrounding this matter must also be clarified by you, both to us and to your attending physicians. * * *

(C-2)

On March 28, 1985, petitioner was examined by Dr. Steven A. Frank at the request of the Board's workers' compensation insurance carrier. Dr. Frank is a general practitioner, who specializes in preplacement examinations and treatment of orthopedic injuries for industry and evaluates worker's compensation claims and public liability. While not certified in orthopedics, Dr. Frank treats orthopedic injuries except those which require surgery under general anesthesia. He has been on the faculty of Rutger's Medical School since 1974 and presently is a clinical assistant professor. Following his examination of petitioner on March 28, 1985, he prepared a written report of his findings on April 1, 1985 for a Ms. Leticia Houlton, a claims representative for the Underwriters Adjusting Company, and on behalf of Niagra Fire Insurance Company, the Board's worker's

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compensation carrier. Dr. Frank reported petitioner's past history and present history, including her hospitalization at the Kennedy Medical Center "* * * where x-rays were taken and also what sounds like a CAT scan * * *. Dr. Frank reported that petitioner was treated with traction, medication and physical therapy for about two weeks in the hospital and that her doctor told her that no surgery was indicated * * *" (C-6, at p. 9). According to Dr. Frank, the pain petitioner described was located in the right lumbosacral area, the anterior thigh, anterior leg, and the great toe. Dr. Frank's examination of petitioner's back included having petitioner bend over from a standing position, walking, and straight leg raising in the sitting and supine positions. Having found no visible or palpable spasm, atrophy, pelvic or shoulder tilt, Dr. Frank did note that petitioner complained of pain during forward flexion or bending. No pain was reported by petitioner on straight leg raising in the sitting position to either leg to 90 degrees, but pain was reported in the supine position at 45 degress on the left leg and less than 20 degrees on the right leg. In light of petitioner's obesity, Dr. Frank concluded that "Objective findings are negative and some of the claimant's complaints simply cannot be explained on an anatomic basis." (C-6, at p. 9-10). Dr. Frank did request medical records from the Kennedy Medical Center and noted that in the meantime "* * * it is not possible to say what treatment, if any, is indicated or whether or not she is able to return to her job."

On April 18, 1985, the Board secretary advised a Mr. George Huk, otherwise unidentified in this record, that the last payroll check issued petitioner was on March 15, 1985. He explained the Board's investigation of whether petitioner suffered "* * * a work-sustained injury * * *" was not completed because its insurance company had not yet received her medical records. (C-3). On May 20, 1985, Dr. Frank reported to the Underwriters Adjusting Company that he received the discharge summary of petitioner from the Kennedy Medical Center covering her hospitalization between February 26 through March 9, 1985. Dr. Frank advised in relevant part as follows:

> The history in the discharge summary states that there was no previous back problem, but the history given to me at my office indicated that there had been previous treatment for her back by Dr. Balon, a chiropractor.
>
> The patient was apparently admitted [to the Medical Center] because of need for injectable medication for pain. The patient was seen in consultation by Dr. Medina, an orthopedist, who recommended physical therapy. Urinary infection was noted and treated, she was treated with oral medications and a weight reduction diet. The laboratory workup was related to medical problems rather than orthopedic or neurologic. The only test done

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> for her back problems was x-rays of the lumbosacral spine which were reported as normal and CAT scan of the spine which revealed hypertrophic changes (the doctor does not state at what level these changes were).
>
> DIAGNOSIS: Taking my previous history and physical examination into account, along with this discharge summary, my diagnosis would be: - Previous symptomatic degenerative disease of the lumbosacral spine secondary to obesity. - Acute lumbosacral sprain superimposed on chronic degenerative disease due to this accident.
>
> OPINION: I find no permanent disability in the back due to this accident. There is previous disability due to degenerative disease aggravated by obesity which was not permanently aggravated, accelerated, or exacerbated by this accident. In my opinion the claimant requires no further treatment or restrictions from physical activity.
>
> (C-6, at p. 13)

On June 3, 1985, Ms. Houlton advised petitioner that her claim "* * * is not compensable under the provisions of the New Jersey Workers' Compensation Law and that voluntary payments of medical expense or disability compensation" were denied. (C-6, at p. 8). On June 6, 1985, the superintendent advised petitioner that the Board "* * * can see no valid reason to disagree with Ms. Houlton's conclusion." (C-4). Superintendent did advise petitioner, however, of a further opportunity to support her claim by her physicians' opinions that she was injured during the course of her employment on February 15, 1985. Finally, the superintendent advised petitioner that the Board accepted Dr. Frank's medical opinion that she required no further treatment nor restrictions from physical activity and that, accordingly, he and the Board expected her to return to work.

Dr. Andrew L. Hahn, a professor of medicine at Rutger's Medical School and clinical professor of neurology, though he has no formal training in that discipline, and assigned to St. Peter's Medical Center as Program Director of the Residency Program and Internal Medicine, testified that on or about June 18, 1985, he examined petitioner. Dr. Hahn testified that his physical findings based on that examination together with petitioner's history and her explanation of the alleged accident which was to have occurred on February 15, 1985, included findings that petitioner had tenderness in the right sacral area, that she complained of pain in both legs on straight leg raising and that the pain was more severe in her right leg, that there was a diminution of pain sensation in petitioner's inner aspect of her right lower leg and foot. While Dr. Hahn concluded petitioner suffered a specific episode of injury on February 15 which resulted in acute low

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back strain which has become chronic, he cannot specifically explain why the strain has become chronic. He did, however, rely upon petitioner's statements to him in arriving at his conclusion because the physical findings in low back syndromes are variable depending upon age, weight, and preexisting illnesses. In this case, Dr. Hahn testified, based on what petitioner said to him he found a specific episode of injury which resulted in the acute strain which has since become chronic because of the pains asserted sudden onset, that petitioner felt something snap in her lower back, that she was doing heavy physical labor at the time of the snap, and she had immediate pain. The snap to which petitioner refers, according to Dr. Hahn, creates a medical presumption that a tear of muscular or ligamentous tissue occurred at the time and that an actual rupturing of the muscle or ligament resulted. Essentially, Dr. Hahn explains, the muscle is pulled apart. While Dr. Hahn admits that a tumor or disc disease could cause similar pain symptoms as described to him by petitioner, he did not perform any tests in this regard because he said such tests were performed during her hospitalization at the Kennedy Medical Center. Dr. Hahn could not offer an opinion, he says, without more information on the issue of whether an urinary tract infection contributes to petitioner's low back pain. Nonetheless, Dr. Hahn insists that some traumatic event occurred to petitioner which caused her low back strain to become chronic based solely on the history of the pain as described to him by petitioner.

Some time after Dr. Hahn's examination of petitioner, he referred her to Dr. Bernard Sandler, chief of physical medicine and rehabilitation at St. Peter's Medical Center. Dr. Sandler, it is noted, is presently the acting chairman and clinical professor on a part time basis of the Department of Physical Medicine and Rehabilitation at Rutger's Medical School. He is Board certified in physical medicine and rehabilitation. Dr. Sandler testified that he examined petitioner on July 5, 1985, upon Dr. Hahn's request because of her asserted radiation of pain down her right leg, numbness in her right foot, limitation of motion, and because petitioner complained that she cannot perform her work duties.

At the time Dr. Sandler examined petitioner, her chief complaint was pain in her back with the pain radiating into her right leg. Petitioner advised Dr. Sandler that she worked in a school cafeteria and pushed "heavy equipment about." She described the snap in her back which was to have occurred February 15, 1985, and that she saw a chiropractor for one week. Dr. Sandler notes in a report prepared January 15, 1985 that the more he talked with petitioner the more tearful she became. He concluded that petitioner "* * * was in great distress. It was also obvious that she could not tolerate the

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idea of going back to her job which would continue to put her at risk of injury and cause her pain." (C-6, at p. 5-6). Dr. Sandler described the examination he performed upon petitioner in the following manner:

> On examination, I saw an obese lady in definite distress. Straight leg raising on the right could be carried out to 35 degrees. Straight leg raising on the left was a little better and could be carried out to about 45 or 50 degrees. On flexion of the spine, her fingertips still could not get closer to the floor than 14 or 15". She complained from time to time of a shooting pain in the right big toe and some numb feeling in the right leg. Deep tendon reflexes were symmetrical. I could not pick out any dermatomal distribution of sensory loss. I could see no atrophy at this time.
>
> It appears to me that the lady indeed does have a chronic low back syndrome which would not be helped by going back to work requiring strenuous physical effort. It also appears to me that all attempts at helping this lady through physical medicine and rehabilitation approaches should be tried. I think a trial of four to six weeks of therapy involving active exercise would give us a better handle on the picture. Clearly, in my view, the lady at present is disabled and should not go back to her previous work. If after a four to six week trial there is a significant change, we can then discuss the next step. For the present, I feel that any strenuous physical effort should be markedly curtailed and we should do everything we can to get the lady in somewhat better condition in terms of overall strength and endurance. It is obvious that the traditional modalities such as transcutaneous nerve stimulation have not worked in the past. * * *

On August 9, 1985, Dr. Sandler reported to Dr. Hahn that after three weeks of outpatient physical therapy petitioner was suffering more pain than ever and would not continue in therapy. Dr. Sandler also reported that he was then more convinced than ever that petitioner is essentially disabled and is beyond rehabilitation. He concluded by stating "I think because of her age, her weight and her previous injuries, at this time we should let well enough alone." (C-6, at p. 7).

Dr. Sandler testified at hearing that he personally examined petitioner on July 6, 1985 for between 60 to 70 minutes. Dr. Sandler found limitation of motion with a subjective pain into petitioner's right leg, she had trouble with straight right leg raising and numbness in her foot, and that she was in distress. He performed a neurological examination and a physical atrophic examination which, he says, has to do with range of motion and consists of reflection testing, sensory testing and muscle testing. Based on

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that examination, Dr. Sandler's medical opinion was and is that based on petitioner's statement to him she was trying to lift a heavy load in conjunction with her age, size and lack of good physical condition petitioner is suffering from trauma superimposed on lumbar osteoarthritis. Dr. Sandler explains that prior to February 15, 1985, petitioner was suffering from lumbar osteoarthritis which signifies changes in the back which have to do with wear and tear, aging, and the previous injury reported by petitioner while buffing the floors. Lumbar osteoarthritis creates the future risk of fluctuating episodes of pain and disability even without the history of injury. While admitting that no test can prove or disprove a traumatic event occurred on February 15, 1985 to petitioner, the risk of injury to one suffering from lumbar osteoarthritis in light of petitioner's age, physical condition and size put her at such risk and in light of her explanation that she felt the pain that more likely than not she did suffer the trauma on that date. Moreover, Dr. Sandler testified that the pain radiating down petitioner's right leg into the ankle and foot evidences nerve root damage or radiculopathy. Dr. Sandler explains that he discounts a urinary tract infection at the time of petitioner's original hospitalization as the cause of the pain radiating down into her right leg, foot and toes because that kind of pain, he says, can only come from nerve root irritation or nerve root involvement. While acknowledging that similar pain can be caused by a tumor involving meninges, the membranes covering the spinal cord, there is no evidence of carcinoma (cancer) or metastasis, the shifting of a disease from the primary source in the body to other locations. Thus, Dr. Sandler affirms his diagnosis that petitioner suffers from trauma superimposed on lumbar osteoarthritis with radiculopathy and, it is inferred, Dr. Sandler is of the view that the radiculopathy is a result of the asserted accident on February 15.

While Dr. Sandler examined petitioner on July 6, 1985 and perhaps one other time during August 1985, he is presently of the firm opinion that it is not necessary for him to examine her again for him to say petitioner can do light work but not heavy work of a custodian which would require lifting tables over 50 or 60 pounds. His opinion is that petitioner could return to work on light duty which would involve the lifting of no more than 10 or 20 pounds.

Dr. Hahn, in a report dated August 30, 1985, submitted to petitioner's counsel of record reports that

> * * *
> My impression was that [petitioner] had a chronic low back syndrome without specific evidence of a radiculopathy; since she

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> had already had a negative CT scan and also lumbosacral x-rays at JKF, no further diagnostic studies were felt to be indicated * * * This lady has a low back strain syndrome which has become chronic, and is disabled in terms of ability to be on her feet for long periods of time or to do heavy physical work. The period of disability is at this time indefinite.
>
> (C-6 at p. 16)

Dr. Frank reexamined petitioner at the Board's request on November 22, 1985, and in a report dated November 23, 1985, Dr. Frank, having reviewed Dr. Hahn's report of June 18, 1985, which is not in evidence before me provided the following opinion:

> [Petitioner] has subjective complaints which are not substantiated by any objective physical findings and are nonanotomic. I find no permanent disability due to this alleged accident. There is previous chronic degenerative disease due to age and obesity which was not permanently aggravated, accelerated, or exacerbated by this accident. Over the counter pain medication is all that is needed in the way of treatment. She is able to work within the limits of age and obesity. There is no indication for any other medical treatment. She will not benefit from spinal manipulation or physical therapy.
>
> (C-6 at p. 2)

At hearing, Dr. Frank specifically rejects Dr. Sandler's conclusion that petitioner evidences radiculopathy or nerve root ending damage. Dr. Frank testified that radiculopathy cannot be based solely upon a patient's statement of some past event and that it is unacceptable medical practice to form an opinion of radiculopathy on a vague shooting pain somewhere in the right leg. Dr. Frank explained that in order to arrive at a diagnosis of radiculopathy one must first identify the specific nerve root in question by securing a history of the pains location to that specific nerve root. In this case, Dr. Frank explains, petitioner's pain is close to the fourth lumbar root, the nerve between the third and fourth lumbar vertebra. While damage to the fourth lumbar root could explain petitioner's pain shooting down the shin and into the great toe, petitioner's pain is in the entire anterior aspect of the thigh. The fourth lumbar root, according to Dr. Frank, only goes to the lower third of the anterior thigh. Dr. Frank explains that the next step would be to determine if reflexes of the knee are different. Radiculopathy of the fourth lumbar root would diminish one's right knee reflex. In petitioner's case, Dr. Frank testified petitioner's right knee reflex is not diminished. Next, Dr. Frank says one must then examine the CAT scan to see if the fourth lumbar root is under any pressure from the bone, a herniated disc, or other structure in the spine. In petitioner's case, Dr. Frank

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explains there is no such outside interference. Next, Dr. Frank would perform an electromyography which would show definite changes in nerve conduction after the existence of pressure on a nerve root for about two or four yea· Finally, Dr. Frank discounts the damage to the fourth lumbar roots because there is no shrinkage of the muscles in the anterior thigh.

Dr. Frank discounts the fifth lumbar root as well because, in his view, there would be no pain in the great toe. While he admits damage to the fifth lumbar root could create pain in the second, third or fourth toe, he is certain no pain would exist in the great toe because the fifth lumbar root does not go to the great toe. Finally, Dr. Frank discounts radiculopathy of the first sacral root because of absence of shrinkage in the calf muscles.

In Dr. Frank's view, the pain suffered by petitioner is due to chronic osteoarthritis and the 90 extra pounds of weight over ideal body weight petitioner carries 24 hours a day which places great weight on her spine. Dr. Frank does not dispute, nor does any doctor dispute, petitioner is suffering from chronic low back syndrome. Dr. Frank, however, is of the view that the low back syndrome is consistent with osteoarthritic back disease and in petitioner's case her pain is not due to an accident nor to radiculopathy.

This concludes a recitation of the proofs in the matter.

LAW

The statute of reference, N.J.S.A. 18A:30-2.1, provides in part as follows:

> Whenever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave * * *

In Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 415 (App. Div. 1982), the phrase "accident arising out of or in the course of his employment" was interpreted by Judge Pressler having declared the Commissioner has authority under N.J.S.A. 18A:6-9 to hear disputes centering on N.J.S.A. 18A:30-2.1, held as follows:

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> [W]e are persuaded that the phrase as used in N.J.S.A. 18A:30-2.1 was intended to have precisely the same meaning as it does in the context of the Workers' Compensation Act. This is made clear by the Statement accompanying the 1967 amendment of N.J.S.A. 18A:30-2.1, which notes that its purpose is to "to provide leave of absence with pay in cases of injuries or illness arising from the employment and subject to the Workman's Compensation Act." The pertinent provision of the Workers' Compensation Act, N.J.S.A. 34:15-7, provides for benefits to an employee for injuries or death sustained "by accident arising out of and in the course of employment," the same formulation as is used in N.J.S.A. 18A:30-2.1. In the worker's compensation context, except in the so-called heart cases, the term "accident" has traditionally been construed to include all work-related episodes and events resulting in injury, and indeed all unexpected injuries, whether or not unusual strain or exertion was involved and whether or not there was a direct impact.

The Workers' Compensation Act does not embody the common law concept of proximate cause; on the contrary, it is enough if the employment is a contributory cause of the injury. Wexler v. Lambrecht Foods, 64 N.J. Super. 489, 501 (App. Div. 1960), quoting Secor v. Penn Service Garage, 19 N.J. 315, 319 (1955). When an employee is admitted to an employer's work force, the employee makes no warranty of physical or mental fitness, or freedom from latent or patent disability or disease. Belth v. Anthony Ferrante & Son, Inc., 47 N.J. 38, 45 (1966). The employer takes the employee as is, handicapped by any physical impairments, whether or not observable, as well as to any underlying condition or unusual susceptiability or idiosyncrasy or quiescent disease, which when subjected to accidental work-connected injury may result in greater disability then would follow if such impaired physical condition or weakness were not present. Id., at 45. Because the employer is said to take the employee as he finds him, a pre-existing infirmity of the employee does not disqualify a claim under the "arising out of employment" requirement if the employment aggravated, accelerated, or combined with a disease or infirmity to produce the disability for which compensation is sought. Wexler, 64 N.J. Super. at 501.

Contrary to petitioner's contention, the rule in the recent case of Sirianni v. Howell Twp. Bd. of Ed., 1986 S.L.D. - (Feb. 5, 1986) which held the Howell Board should have independently investigated the nature of an employee's disability to determine entitlement of benefits under N.J.S.A. 18A:30-2.1 is not applicable here. The Howell Board agreed that Sirianni was disabled by shigellosis but its insurance carrier concluded that the illness was not a personal injury caused by an accident arising out of and during the course of her employment as school nurse who worked with preschool handicapped

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pupils. Although the insurance carrier eventually concluded that the illness was work-related, it allowed disability for only three months instead of the six month period of disability Sirianni's personal physician earlier reported. On these facts, the Howell Board was criticized for placing total reliance upon its insurance carrier's judgment that Sirianni did not contact shigellosis in the performance of her duties and that her resulting disability was three, not six, months. It was held that the board, in light of Sirianni's personal physician's diagnosis, should have sought independent medical advice.

Here, the issue is one of a past specific event. Did petitioner experience a snap in her back on February 15 while pushing cafeteria tables which, in turn, resulted in her absence from duty since February 16, 1985.

FINDINGS

The evidence in this case fully supports a finding that petitioner has for some time suffered from low back syndrome or lumbar osteoarthritis, a condition brought on by age, weight, and perhaps a prior aggravation of such condition. The medical testimony is in agreement with that diagnosis. I am not persuaded by Dr. Sandler's testimony that any incident which may have occurred on February 15, 1985, produced radiculopathy in light of Dr. Frank's clear and precise testimony as to how such a diagnosis should, under medical standards, be made. Dr. Frank's testimony is more persuasive that radiculopathy is not a present condition from which petitioner suffers nor is it a condition which was created by any incident which may have occurred to petitioner on February 15, 1985. It is to be quickly noted, however, that petitioner's lumbar osteoarthritis has been recently aggravated or accelerated which requires a consideration of whether the events occurred on February 15, 1985 as petitioner describes or, to the contrary, is petitioner's recitation a fabrication in order to receive the benefits of the above cited statute.

Having studied the medical testimony, together with the testimony of the lay witnesses including petitioner, Skolsky, Mamora, and petitioner's son, I am persuaded petitioner's chronic lumbar osteoarthritis was aggravated and accelerated during the course of her employment when something in her back snapped on February 15, when she was pushing cafeteria tables. It is inconceivable to me how Mr. Skolsky could testify that when petitioner requested permission to go home early on February 15 that the conversation lasted ten to 15 minutes without the basis for petitioner's illness not being discussed. It may be that Mr. Skolsky simply did not hear petitioner explain she had just

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injured her back after having been asked to complete an accident report but that does not dissuade me from accepting petitioner's testimony that she in fact told Mr. Skolsky at some point on February 15 that she did, in fact hurt her back. It is obvious that petitioner requested Mr. Skolsky to complete the accident report because petitioner, a foreign born American citizen, has great difficulty with the English language. A serious question exists whether petitioner can read the English language. That being so, petitioner simply could not complete an accident report without assistance.

While Mr. Skolsky's explanation that petitioner remained on the job February 15 after being told that if she left early he would get her a replacement for Saturday, the overtime day for custodians, is attractive, and I accept that testimony as true, petitioner's remaining on the job for her full tour of duty February 15 and reporting to work February 16 does not erase the fact that while she was pushing cafeteria tables something snapped in her back.

Petitioner's testimony stands unrefuted in the record that on Tuesday, February 19, 1985, she reported the accident to R. Zmijewski. Consequently, Mr. Skolsky and Mr. Zmijewski were both orally advised by petitioner of her injuring her back while pushing cafeteria tables. Consequently, petitioner did not delay advising her supervisors of the snap in her back. There is no objective test that can be administered a patient to prove or disprove the event complained of here by petitioner. Consequently, as Drs. Hahn and Sandler testified, one must rely in great measure upon the person's own statement of what occurred. In this case, I am persuaded by the testimony of petitioner that she felt something snap in her back on February 15, 1985 which in turn created the condition described by Dr. Sandler as "trauma superimposed on lumbar osteoarthritis" which, in turn, disabled petitioner through at least November 25, 1985, the hearing date, when she testified she would attempt to return to work on light duty and perform duties restricted by her age, weight, and lumbar osteoarthritis.

CONCLUSION

I **CONCLUDE** the Commissioner has authority to hear and determine this dispute. I also conclude petitioner is not barred from seeking relief through waiver, laches, or estoppel.

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I also **CONCLUDE** that petitioner Wasylina (Marie) Onulak is entitled to the benefits of N.J.S.A. 18A:30-2.1 by way of regular salary for the period February 15, 1985 through November 25, 1985 when she was absent from her employment because of a personal injury caused by an accident arising out of and in the course of her employment and I further **CONCLUDE** that her absence during that period of time shall not be charged to her annual sick leave or accumulated sick leave. Therefore, the Metuchen Borough Board of Education is **ORDERED** to pay Ms. Onulak all wages withheld from her during the defined period of disability and to credit Ms. Onulak's sick days otherwise improperly charged her.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 4, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

APR - 7 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 9 1986
DATE

Ronald L. Parke /ES
OFFICE OF ADMINISTRATIVE LAW

bc

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WASYLINA (MARIE) ONULAK,

PETITIONER,

V.

BOARD OF EDUCATION OF THE BOROUGH OF METUCHEN, MIDDLESEX COUNTY,

RESPONDENT.

COMMISSIONER OF EDUCATION

DECISION

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

The Board's exceptions to the initial decision and petitioner's reply to those exceptions were filed with the Commissioner pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

The Board argues in its exceptions that the ALJ erroneously concluded that petitioner had satisfied her burden of proving that she suffered a work-related injury on February 15, 1985 while in the performance of her assigned duties as a custodian.

The Board contends that petitioner's description of the incidents which occurred on February 15 and 16, 1985 is not credible and has been reliably and effectively rebutted by the adverse testimony of the head custodian and a maintenance handyman employed by the Board.

Moreover, the Board argues, all the physicians who testified at the hearing agreed that there is no existing objective medical test which could verify whether petitioner's injury was sustained in the course of her employment. Furthermore, the Board points out that the record establishes that petitioner failed to file a formal accident report of the incident until March 12, 1985, approximately one month after its alleged occurrence. In the alternative, the Board argues that the ALJ erred in granting petitioner back salary up to and including November 25, 1985. The Board reasons that the ALJ, by accepting Dr. Frank's medical testimony over that of the other two physicians who testified on petitioner's behalf, should have also accepted Dr. Frank's opinion previously given on March 28, 1985 that petitioner was able to return to employment as of that date.

Therefore, the Board contends that, should the Commissioner agree that petitioner's injury was work-related, then her entitlement to back salary must be limited to the period of time from February 15 to March 28, 1985.

Petitioner in her reply to the Board's exceptions urges the Commissioner to reject said exceptions on the grounds that it has

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been established in case law that credibility findings are the responsibility of the trier of the facts, namely the ALJ who had an opportunity to hear and observe the witnesses who testified at these proceedings.

The Commissioner has reviewed the arguments advanced by the parties in support of their respective positions in the instant matter.

The Commissioner is not persuaded by those arguments presented by the Board with respect to the errors which it claims the ALJ made in arriving at his findings of fact based upon the credibility of the testimony of the witnesses in this matter. In arriving at this determination the Commissioner relies upon the Court's ruling in Mayflower Securities v. Bureau of Securities, 64 N.J. 85, which has been cited on page 1 of petitioner's reply to the Board's exceptions and is recited below in pertinent part:

> ***Finally, on the matter of the applicable law, the thoroughly established scope of judicial review of administrative adjudications should be briefly noted. As to state agency findings, the role of the appellate court is that of determining "whether the findings made could reasonably have been reached on sufficient credible evidence present in the record, considering 'the proofs as a whole,' with due regard to the opportunity of the one who heard the witnesses to judge of their credibility *** and *** with due regard also to the agency's expertise where such expertise is a pertinent factor." Close v. Kordulak Bros, 44 N.J. 589, 599 (1965).*** (at 93-94)

Additionally, the Commissioner finds and determines that the Board's argument, that the ALJ's reliance on the testimony of Dr. Frank required a finding that petitioner's claim for back salary is limited to the period from February 15 through March 28, 1985, is without merit.

A careful review of the initial decision establishes that, while the ALJ, did in fact, rely on the medical opinion of Dr. Frank to rule out that portion of Dr. Sandler's opinion that petitioner's injury evidenced nerve root damage or radiculopathy, the ALJ did, however, concur with Dr. Sandler's view that petitioner suffered from chronic lumbar osteoarthritis which was aggravated and accelerated as the result of an injury which she sustained.

In the Commissioner's judgment the record of this matter establishes that the ALJ reasonably concluded that petitioner's injury was work-related and that, as a result of such injury, the chronic lumbar osteoarthritis from which she suffers was accelerated and exacerbated.

Accordingly, the initial decision is hereby affirmed and summary judgment is hereby entered on petitioner's behalf.

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The Board is directed pursuant to the provisions of N.J.S.A. 18A:30-2.1 to compensate petitioner by way of her regular salary for the period of February 15, 1985 through November 25, 1985. Petitioner's absence from employment during this period of time shall not be charged to her annual or accumulated sick leave.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5307-85
(EDU 11066-82 ON REMAND)
AGENCY DKT. NO. 460-12/82A

JANE REIMER,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF NEWARK, ESSEX, COUNTY,
Respondent.

Michael J. Reimer, Esq., for petitioner (Simms & Reimer, P.C.)

J. Issac Porter, III, Associate Counsel, for respondent
(Vickie A. Donaldson, General Counsel)

Record Closed: March 31, 1986 Decided: April 4, 1986

BEFORE **NAOMI DOWER-LaBASTILLE**, ALJ:

Jane Reimer, a tenured teaching staff member, filed a petition in December 1982 (EDU 11066-82) charging the Board of Education of the City of Newark with transferring her from the Thirteenth Avenue School to the Madison Avenue School arbitrarily, capriciously and with retaliatory intent. The undersigned administrative law judge granted summary decision for the Board on April 22, 1983, which was adopted by the Commissioner on June 9, 1983 and affirmed by the State Board on June 8, 1984. On May 31, 1985, the Appellate Divison remanded for plenary hearing (A-4774-83T7). The matter was retransmitted to the Office of Administrative Law on August 21, 1985 for determination as a contested case after a plenary hearing pursuant to N.J.S.A. 52:14F-1.

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Procedural History After Remand

Shortly after the remand file was received, by my letter of August 30, 1985, I set forth a discovery schedule which required that interrogatories be sent by September 13 and answered by September 27, and that depositions be taken by the first week in October, 1985. I directed that the Board immediately commence gathering information on enrollment and class size at both schools in the fall of 1982. A prehearing was held on September 26. The Board had not submitted the information in accordance with my prior directive, so that the discovery schedule had to be extended. Hearings were scheduled to begin October 31 and to continue on November 1, 4, and 16, 1985.

On October 8, petitioner filed a motion to amend the relief requests and to compel responsive answers and for sanctions against the Board for failure to provide information which I directed be supplied as far back as my August letter. On October 15, 1985, I held a telephone conference which resulted in a directive to the parties to confer on October 16 to resolve outstanding discovery requests. Due to the lack of discovery required by the petitoner, the evidentiary hearings had to be adjourned. Instead, a motion hearing was held on October 31, 1985 to resolve numerous pending motions and discovery disputes. On November 1, 1985, I wrote to the parties, recapitulating my determinations on the motions heard the day before.

Among the matters determined were: a motion to amend to add additional relief requests was granted; the Board's motion to bar petitioner's medical reports and expert testimony was denied but petitioner was to execute a waiver of confidentiality to Dr. Schrader as supplied by Board counsel; petitoner's motion to compel the Board to produce evaluations of other teachers was denied; the Board was ordered to supply certain answers to interrogatories and petitioner was to respond to requests for admissions and supply documents; and petitioner's motion to strike the Board's defenses for failure to complete discovery in time was denied but the Board was ordered to pay the cost of the court reporter's appearance and transcript for the second set of depositions required due to belated discovery by the Board. New hearing dates were scheduled.

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Hearings were held on February 18, 19, 20, 21 and 24, 1986. A list of the exhibits entered into the record at the hearings is attached to this decision. Simultaneous briefs were filed on March 17 and the last answer was filed on March 31, 1986, when the record closed.

The Issues

The issues as stated in the prehearing order are:

1. What were the reasons or reason for petitioner's transfer from the Thirteenth Avenue School to Madison Avenue in December 1982?

2. Was the transfer patently arbitrary, without rational basis or induced by improper motives including but not limited to retaliation?

3. If retaliation on the part of administrators Berry and Curry is proved, and their actions to recommend transfer were improper, does that render the Board's action to transfer arbitrary under any circumstances?

4. If retaliatory action is found, should the following relief be granted?

   The relief request was amended subsequent to prehearing to include additional elements of relief, as set forth below.

   (a) Payment of salary from December 1, 1982 until June 30, 1983 with interest.

   (b) Reinstatement of all such days and personal days to which petitioner would have been entitled on December 1, 1982.

   (c) Payment of all retirement contribution benefits due for the period December 1, 1982 to June 30, 1983 as if she had worked.

   (f) Restoration of seniority time for the period as if petitioner had worked.

   (g) Any other appropriate relief.

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The petitioner made clear that she did not seek a return to her prior assignment as a remedy.

In addition to the broad issues stated above, the Appellate Division indicated that certain specific factual questions should be answered through plenary hearing. The court questioned why petitioner was transferred to teach first grade at another school on the stated basis of declining enrollment when her fifth grade class continued as a unit until the end of the school year with a new teacher. The court questioned how petitioner's principal could have made a unilateral decision to transfer after having learned, on the same day, that his school had an excess of teachers whereas Madison Avenue School had insufficient teachers. The principal's affidavit filed in that record was brief and conclusory and contained no underlying statistics concerning enrollment and faculty at either school. Thus, the reason for a sudden (within five days) mid-year shift was not apparent. Finally, the court noted that petitioner had been given three reasons by her principal for her transfer which had nothing to do with enrollment shifts. The appellate division did not preclude the Board from proving any sound reasons it may have had for the transfer, even if such reasons had not been expressed in the affidavits and certifications before the court.

Thus, an unlimited plenary hearing on all issues was called for. The ALJ felt a particular duty to spread on the record underlying facts which might reveal the answers to questions expressed by the court, and to that end sometimes personally questioned the witnesses and asked them to interpret enrollment, class roster and teacher attendance records. As it developed, the answers to the question had nuances which neither side chose to stress, since all the witnesses, including the petitioner, took pains to preserve their professional collegiality.

Discussion of Testimony

Petitioner Reimer had been assigned to Thirteenth Avenue School since it opened in 1971. Until 1982, the school contained prekindergarten through grade 8 and special education classes. Reimer stated her training, education, certification and grade

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assignments through the years, and offered evidence of special commendations and complimentary evaluation and observation reports she had received. She offered memoranda concerning her success with students and grades attained by her students in the statewide tests which showed their excellent progress and level of their work versus that attained by students in other classes.

Respondent has never contended that Reimer's in-classroom academic service was anything but good. Reimer's testimony concerning her superior qualities as a teacher was in support of her theory of retaliatory transfer. It was her intention to show that all other teachers who were transferred were chosen because their work was inferior, yet she was chosen despite her superior performance. Such a showing might suggest an improper motion for a transfer. Reimer also explained away a few notes which were critical, such as those of February 16 and March 16, 1979 (P-5), which charged her with failure to sign out, contrary to Board policy. She explained that her conduct in those instances was in accordance with a union directive as a result of a dispute which the NTA was having with the Board at that time. There was a lone incident when she called in late to report she would be absent. (P-5c). Reimer pointed out that these notes (P-5) were the only negative documentation of her performance in 12 years.

Reimer then began to describe certain incidents which she believed were the reason for her transfer. In 1980-81, Ozander Curry became vice principal of 13th Avenue School. He was Reimer's immediate supervisor. In May 1981, two female students came upstairs at lunch time, very upset, and told Reimer they had just been accosted and robbed. Petitioner sent notes to Curry and Principal Bert Berry, but got no response. She then went downstairs and called police, who said they would respond and investigate. Later that afternoon, Curry sent Reimer a memorandum (P-6A) chastising her and advising that under no circumstances involving students was she to call the police to come to the school without consulting her immediate supervisor. (In fact, Principal Berry directed Curry to write this memo). Reimer wrote back that she had no knowledge of Board policy to that effect, that no one else had taken action, concluding, "It seems to me at this point that an effort on the part of the administration in reporting the incident in a timely fashion to the proper authorities should have at least been equal to the effort you have expended in typing a letter to me." (P-6B).

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It should be noted that at that time, the N.J.E.A. was lobbying for a statutory change to protect teachers who reported incidents of violence in the schools in accordance with N.J.S.A. 18A:17-4.6. The legislature did repeal that statute and adopted a new one to protect Board employees effective October 28, 1982 (L. 1982, c. 163). The issue had been a controversial one for some time, since many boards did not want the police called in to the schools upon the belief it would reflect on their administration.

The following school year, 1981-82, about ten months later, Reimer observed a student, H.R., carrying a gun outside the building and contacted an administrator, Mr. Geiser, who was to inform another vice principal named Hooper. The next day she wrote to Hooper and asked what action was taken. He replied, "Nothing." (P-7).

In the next school year, 1982-83, at the end of October or the beginning of November, Reimer sent Berry a note asking what action should be taken if a student doesn't bring back a signed discipline form (P-8A). Berry responded: "If necessary, please give another to the student . . ." (P-8B). Reimer testified that she was having serious disciplinary problems with this student,E.C., which she had brought to the attention of Curry and that nothing had been done. She wrote a letter to principal Berry on or about October 19, 1982, expressing great frustration at the lack of administrative assistance she was experiencing (P-9A). She indicated in the letter that she was sending a copy of it to the superintendent, Columbus Salley. In fact, she thought better of it and never sent the letter to Salley (P-9B). She kept it, but Berry had no way of knowing that. She delivered A-9A to Principal Berry's office, and believes he received it because somebody mentioned to her that Berry was upset about it. Neither Berry nor Curry nor anyone else responded to the letter sent to Berry, but Reimer continued to ask Curry to take some action. She believes that he became annoyed about it. The student was removed from her class about a month or so later. This incident is the most significant one which Reimer remembers which might, in her opinion, have been the reason for her transfer. Subsequently, Berry testified that he had no recollection of having received the letter or of having read it and that it was not in his personnel file. (3T82-84).

There was a dispute as to whether or not the Board or the petitioner had initially produced P-9A when Board counsel questioned Reimer about it at deposition. P-9B was

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produced at the same time; that letter to Dr. Salley was never sent and therefore could not have come from the Board files. The xerox copy of P-9A introduced at deposition and marked R-1B is stamped "Received October 7, 1985 Legal Department." The copy introduced by petitioner at hearing is an older copy on non-xerox paper on which there are faint ruled lines. It appears not to be from a xerox copier. The xerox copy was apparently made from it (since it faintly copied the ruled lines). The testimony of Berry that he does not recall seeing the letter and it was not in his file, and the fact that P-9A was in Reimer's hands and not from Board files, indicates that Berry may never have received it. There is certainly no proof that he did. It seems unlikely that Berry would have forgotten a letter which indicated that a copy had been sent to the superintendent. Reimer may have made a copy for her own records when she sent P-9A to Berry, but she did not testify that P-9A was a copy made by her.

The testimony which gave the greatest support to petitioner's theory, was the testimony describing the reasons why she was chosen which were given to her by Principal Berry at the conference on December 1, 1982 wherein she learned she was to be sent to Madison Avenue School. She made notes then and there on an envelope. Berry asked her if she knew why she was being transferred. She replied she didn't want to know but that if he wanted to tell her, he should go ahead. Berry said that it was because she was always looking for favors, she dismissed her classes early and was in her car at 2:45 each day, and that she left youngsters standing in the hall for disciplinary reasons (from P-11 notes). She also made a note of her new principal's name (Leroy Dasher), and the grade she was to teach at Madison (first). Petitioner then went into the outer office, called her union representative, and made notes in pen on P-11 regarding what he told her.

In fact, the "reasons" Berry discussed with petitioner were not "official" reasons authorized by the Board as such. The negotiated contract specifically addresses involuntary transfers from school to school, requiring that they be made only for just, fair and equitable cause and provides, "upon request, the Department of Personnel shall furnish the employee who has been so transferred an explanation in writing, for said transfer." (J-5, page 28). Petitioner never requested an explanation and thus she never received an authorized, official explanation.

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Petitioner asked for a conference with her immediate superior, Vice Prinicpal Curry, after she was advised of the transfer. Curry at first agreed (P-12), but when petitioner asked him to reschedule the time, he cancelled the conference and referred her questions to Principal Berry. (P-13). It seems quite clear that at least from the time petitioner spoke to her union representative, if not earlier, she was thinking in terms of litigation, so it is not surprising that Curry should refer questions to his superior. On Friday, December 3, 1982, petitioner left the 13th Avenue School and on Monday, December 6, she reported to Madison Avenue School, where she was assigned to the fourth grade (not the first, as she had been told by Berry). She began teaching and later in the day spoke to the vice principal there, Mr. Brodo. She became hysterical during their conversation and began to cry. He suggested she take some time to think about what she was going to do. She went home and did not return until June 15, 1983. Petitioner suffers from ulcerative colitis, which flares up from time to time. The ulcerative colitis was exacerbated by her emotional distress.

In January 25, 1983, the Board of Education officially voted to transfer petitioner, along with numerous other teachers throughout the system. Petitioner attended the January 25th Board meeting and well remembers it because that date was also her wedding anniversary. Petitioner had her physician, Dr. Schrader, write to the Board stating she would be unable to return to work for a while due to ulcerative colitis (P-14). She did not visit Dr. Schrader until December 28, 1982, during Christmas vacation, more than three weeks after she left the Madison Avenue School. She did not see him again until February 4, 1983. She had no accrued sick days left by mid-December, despite her many years with the system, due to previous absences some of which were due to ulcerative colitis and others were taken instead of maternity leaves, since petitoner gave birth to three children during her service with the Board and had a miscarriage in October 1982, a month or so prior to her transfer. On May 23, 1983, Dr. Schrader advised the Board she could return to work on June 15. (P-15).

Petitioner's fifth grade class continued intact with a long-term substitute until teaching staff member Iris McMurray came back from maternity leave in February 1983 and took over the class. Like petitioner, McMurray took sick leave for maternity

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purposes, regularly having her physician send notes. McMurray worked a short period at the beginning of school year 1982-83 (September); she had been assigned to the eighth grade that year. Newark teachers get 5 days more sick leave each year (15) than the statute requires. If the teacher has no leave left and certifies that he or she cannot teach due to an extended illness, the Board may grant additional sick leave with pay. (J-5, page 41). On the other hand, maternity leave for up to one year is without pay, but the teacher need only complete 90 days during that year to have the entire year counted for seniority purposes (J-5, page 42). Petitioner was not granted sick leave with pay between December 1982 and June 1983. She did, however, file a workers compensation case based on her transfer and ulcerative colitis, but did not file for temporary disability benefits. Subsequently, she returned to Madison School for 1983-84, but in 1984-85, following another pregnancy, she took sick leave from December 1984 through the remainder of the school year (P-18). Petitioner consistently received satisfactory evaluations at Madison Avenue School. None mentioned her excessive absences.

Reimer called Vice Principal Ozander Curry as a hostile witness. Curry obtained a principal's certification in 1973 and served as an administrator in various Newark schools before he came to 13th Avenue School in 1980. Upon Berry's request, Curry recommended the names of two teachers for transfer: Reimer and Frank Hill. Curry chose Hill because he had poor classroom control. He suggested Reimer because she sometimes placed students in the hall for disciplinary reasons, and he had spoken to her more than once about it. Curry felt that Reimer was a good teacher and he saw no reason to document criticism of this type (5T14). Another reason for his recommendation was that parents had complained to him that Reimer spoke to them in a downgrading manner (5T21). She also took children to the playground at times without requesting permission (5T22).

Curry had very little recollection of specific instances of Reimer's conduct three to five years previously, but he did remember one complaining parent (Edwards) and one occasion when Reimer took her children out without permission. (5T21:22; 5T22:23 to 23:9). Curry felt that Reimer did not always adhere to school policy, but she was good at classroom discipline, despite some exceptions (5T26-27). As for the occasion when he sent Reimer a note concerning calling the police back in 1981, (P-6A), Curry was simply

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following Berry's instructions (5T29:9-12). He did not have any recollection of the note Reimer wrote to him at the time (P-6B). (5T32:13 to 33:20). Nor could he recall what he had said at depositions (5T34:16) or what was said in December 1982 by Berry to Reimer (5T35:4 to 36:11).

It was Curry who initially thought a Mrs. Bethea had substituted in Reimer's fifth grade after she left, but he was in error (5T37:7-11). He was aware of a Board policy that a substitute was not to remain in a class for more than 20 days, and that sometimes a substitute will be replaced for one day only and then continue teaching (5T38:3-20.) Curry had no recollection as to whether this had occurred with Reimer's fifth grade class and, in fact, no witness testified that it had. Nor did Curry have any recollection of the details of Reimer's leaving the school. When he cancelled the final conference with her, he did so because Berry directed him to refer Reimer to him (5T 45-46). Curry could also recall nothing about Reimer's note requesting his help with a student who was a disciplinary problem (5T48:12 to 49:18). He did not recall seeing the note or hearing about the problem at the time. He had never documented any problems with Reimer and never made any charges against her (5T52). In fact, he felt she was one of the top teachers (5T54:21).

Leroy Dasher, the principal of Madison School, testified that in the fall of 1982, his school received a large increase in the number of fourth graders and after conferring with Administrative Supervisor Joseph Marano, he was advised to open up an additional fourth grade class and submit a requisition form for a fourth grade teacher. The form was dated October 14, 1982 (R-145) and was approved by Assistant Superintendent D'Agostino. The new class was staffed by a variety of substitutes until petitioner was assigned to it during the first week in December. When petitioner failed to return for the rest of the year, that class had two per diem substitute teachers and one long-term substitute until June 15, when petitioner returned for a week or so before the end of school (1T187-190). Three or four days before petitioner reported to him, Dasher was notified she would be coming to Madison.

Petitioner visited Madison on Friday afternoon (December 3) before she was to report on Monday. Dasher got the impression she was not too happy about the transfer,

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but she did not mention any medical condition. She indicated she was not happy about undertaking a new situation in the middle of the school year, and she had put a lot of time and effort into getting her class set up at the 13th Avenue School. Petitioner did not complain of any medical problem on Monday, December 6, before she left either. Dasher testified that petitioner does a good job. Her sixth grade class won third prize in the city for its science work one year and she was chosen as a master teacher for 1983-84.

Dasher spoke to Berry when he found out he was getting a teacher from 13th Avenue School. Berry told him he was getting a person who was very capable and who he felt would do a good job at Madison Avenue School. Dasher also received another teacher who once worked at 13th Avenue School, James Woods. In that instance, Berry advised him he had some problems with Woods. Dasher had known Berry for 25 years and knew he would get a straight answer from him if he asked a question. Dasher subsequently was unhappy with Woods, who lasted for a year and a few months at Madison. Two years later, Dasher assigned the children who had had Woods to petitioner since he felt she could help these children catch up on some skills they had missed.

The Board offered two witnesses from its central office whose duty it was to make the determination on which schools were to lose teachers and which were to gain teachers due to shifts in enrollment after the beginning of the school year. Ruth Hazelwood, an administrative supervisor, unit one, elementary program, testified that the 13th Avenue School had an enrollment of 1,523 in June 1982 and that enrollment was off quite a bit in 1982 when compared to prior years and the present. Hazelwood reviewed the 13th Avenue School enrollment of September 30, 1982 and found it was less than normal. She subsequently called the principal and asked if some classes could be consolidated so as to excess teachers for transfer. Similarly, when enrollment is high, central office asks principals to create new classes so that they are not too heavy. In September 1982, Hazelwood found enrollment at 13th Avenue School was down to 1,435. She also considered staffing statistics (R-156 to R-165). She reviews the class by class enrollment, discusses consolidation of some classes and tells the principals "you have to excess so many teachers." (1T225:4). Hazelwood and the other administrators never tell the principals which teachers to excess. The principal alone has the discretion to choose

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those teachers who will be transferred and they cannot refuse to give up the number requested, which in this case, was three. Some of these "excessed" teachers may be moved two or three times (1T226:22). The decision to transfer is based on school enrollment and staffing, considering the optimal class size required for educational reasons (1T226:7-23), but central administration does not look at each class size in the school to determine whether teachers must be excessed (1T232:17-22).

In the fall of 1982 (end of November beginning of December), Principal Berry was ordered to make a choice "posthaste." He responded with the names of the teachers about a week later (1T227:15-25). Ordinarily, the principal's recommendation is followed by the central office, and through it, by the Board, except in some instances where the teacher is unsatisfactory. In 1982, Hazelwood deferred to two other units whose need for teachers was more critical than hers. Thus, petitioner went to Administrator Marano's district where a new class had already been established under a substitute by Principal Dasher and other teachers transferred from Principal Berry's school went to Spencer School (1T229;16-25).

Hazelwood also noted that the teacher who is excessed does not have to come out of the class with the lowest enrollment; central administration is not concerned with what class the teacher is from, only with the general welfare, i.e. the enrollments in toto. The principal exercises his judgment on who will be provided to the central office for transfer (1T234:10-20). The Board is only concerned with whether each class is covered by a certified competent teacher (1T235:17,19). It is normal to move teachers in late October and up to December 1; that is still relatively early in the term since midterm is in February. A principal may take two classes and consolidate them or disperse the students into three or four classes. Petitioner led the largest fifth grade class in 1982, but the principal was free to continue the class and to consolidate others when excessing a teacher. Hazelwood noted that there were at least 70 schools in Newark and she would be unaware as to whether or not a substitute was assigned to a class after a teacher was transferred. The decision would be entirely up to the principal (1T 245).

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Daniel Gutmore is an administrative supervisor in the deputy supterintendent's office, who keeps records of enrollment by school and grade systemwide. He distilled from the documents entered into the record the following facts concerning enrollment at the 13th Avenue School. It went from 1, 523 in September 1981 to 1,435 in September 1982 to 1,367 in September 1983. For Madison Avenue School, enrollment was 913 in 1981, 929 in 1982 and 957 in 1983. At 13th Avenue School, there were 197 fifth graders in 1981, 163 in 1982 and 150 in 1983. In 1982, there were more children in the fifth grade at 13th than in any other grade.

Colleen Malanga, who keeps the Board's personnel records, introduced Board instructional personnel agendas which showed many pages listing the transfer of teaching staff members in October, November, December 1982 and January 1983. Petitioner's transfer was approved retroactively in January 1983. The records produced also contain approvals of substitutes and teachers returning from leave. Malanga testified that it is Board policy for a teacher who runs out of sick days to apply for sick leave together with a physician's statement indicating prognosis and expected date of return (2T162-163). Other testimony indicated that the Board does not actually vote on a grant of sick leave unless the teacher requests paid sick leave, but that teachers like petitioner and McMurray, even though they may be gone for months, as was the case when petitioner stayed out from December 1982 to June 1983, are carried on the school roster as the regular teachers, ("short term" substitutes fill in for them) so long as their physician continues to advise the Board that they are ill. This practice holds the teacher's position open in a specific school so that he or she can return at any time, even two weeks before the close of school (as with petitioner), so long as the teacher spends the first few weeks of the term in the position (as McMurray did).

Bert Berry has been an elementary school principal assigned to the 13th Avenue School since 1971. In 1982, Hazelwood called him and told him he would have to release three teachers due to decreased enrollment and that she needed the names within a day or two. Berry immediately asked for recommendations from three vice principals (13th Avenue School is the largest elementary school in Newark). Vice Principal Curry recommended Reimer. A number of names were recommended. Due to declining enrollment, Berry had received directives to excess teachers for the past ten years (3T 65).

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Berry had a very friendly relationship with Reimer. Whenever Berry's son came to the school, the son would visit her classroom. They lived in the same town; Reimer had known the former occupant of Berry's house and she used to see him jogging in her neighborhood. As a result of this closeness, Reimer sometimes approached Berry concerning getting to school in time or leaving early if she had to pick up other riders for carpooling. He felt he had lost a degree of objectivity in regard to her (3T65-67; 3T71).

Berry was also concerned about Reimer's absenteeism. He felt that having only 13 accrued sick days left after about 11 years of service indicated a high degree of absenteeism. Berry also had heard from a person in the community and at least one staff person that some parents were critical of Reimer; they felt she sometimes exhibited a demeaning or belittling attitude to them. Over the two years before her transfer, he was aware of some unrest and on one occasion he stifled an attempt on the part of a community person to bring the situation to a head. Berry also observed that Reimer did not contribute to the school community over and above normal school hours. She only attended mandatory PTA meetings. Berry's school is the largest one in Newark; he came to the conclusion that Reimer needed a more closely supervised situation, given this constellation of minor but continuing problems (3T 67, 68).

Nevertheless, Berry would not have recommended Reimer for transfer even though he had thought about it previously. He preferred to have recommendations come through the vice principals since an immediate supervisor might be in a better position to observe whether or not the teacher might be more effective in another situation. He himself did not closely supervise the teaching because of the size of the school. There was never any question in his mind that Reimer was an exceptionally good teacher in the classroom.

Berry could no longer recall what reasons he gave Reimer for her transfer at the conference in December 1982 except that he recalled that he mentioned excessive absenteeism (3T 74). He subsequently spoke to the Madison Avenue School principal and told him Reimer was a very good teacher. When asked why she was chosen for transfer, he indicated to Dasher that his relationship with Reimer was such that he believed he

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might have become too flexible in regard to things she was asking of him. Reimer's class was kept intact but Berry could no longer recall the reason for this or the treatment of the classes of teachers who were transferred as excess. Early in 1983, a permanent teacher (Iris McMurray) took over the class when she returned from maternity leave.

Berry believed that the substitutes in the interim were a Mrs. Bethea and Darlene Richardson. (As it turned out, Berry had been told that Bethea substituted in that classroom, but this appeared to be incorrect in that the records did not substantiate that fact and the two teachers most closely involved did not recall Bethea in that position.) Berry testified that both substitutes were competent teachers. He also noted that McMurray was one of his finest teachers and was of the opinion that the class would receive equal instruction from either McMurray or Reimer. Any teacher out on maternity leave had a right to return to her original building (3T81-82). McMurray was not available for transfer in December: she simply was not there and the central office needed teachers immediately. Substitutes could not be involuntarily transferred. Since they are not under contract, they can refuse to work at another school. Only permanent teachers can be required to transfer.

Berry had no recollection whatsoever of the letter which Reimer believes led to her transfer (P-9A, the one copied to Dr. Salley). He did not have it in his file and when shown the letter to Salley (P-9B, which was not sent), he became somewhat excited about it, stating that if any teacher had corresponded with the superintendent without speaking to him first, he would have called her in immediately and he would have remembered the incident (3T84). Berry remembered the 1981 incident, when Reimer called the police without authorization. He asked Curry to draft the memo to Reimer, however, because he wanted to emphasize that Curry, not he, was the authority figure since he was of the impression that Reimer had circumvented Curry in the past by coming directly to him (3T88). Berry's impression of P-6B (letter recalling incident with police) was that it showed some hostility toward Curry, a situation which would cause him some anxiety (3T89, 90). Berry had no recollection of this letter prior to litigation, however. Although he was "copied" with the letter, Berry noted that his clerks sometimes place such letters in the personnel files without his actually having read them first.

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Berry did not recall the affidavit he signed in 1983. The affidavit recited that on December 1 he knew that there was a need for teachers at Madison School. Berry admitted he was in error as to that date since he learned it shortly thereafter when he received the call from principal Dasher who indicated Reimer would be teaching first grade. One month later, when he signed the affidavit, he used the information he obtained from Dasher, which proved not to be correct since Reimer was assigned to a fourth grade class at Madison. Berry also was not sure at the time he signed where the other three teachers were assigned. (3T 97-98). In fact, Berry was not even certain of the names of all the teachers transferred at the time he testified; there were so many that he sometimes confused the events in one year with those in other years. (Due to the remand, Berry's testimony was taken more than three years after the events occurred).

Berry's recollection was that Mr. Woods' and Mrs. Tyrell's students were dispersed to other classrooms. He recalled only that both teachers received satisfactory evaluations and could not remember any incidents concerning them which might indicate they were not such good teachers. He did remember speaking critically of Woods at depositions, but noted a teacher may have needed specific improvements in one year but this might not be true at all in other years (3T104). Berry could not recall specific times when Reimer might have been late or asked to leave early and had never checked the records. Nor had he placed any specific complaints in her evaluations such as notations of excess absenteeism. He stated that he was not allowed to do so unless absences exceeded 18 days in years prior to the Board's instituting an Attendance Improvement Program.

Midway during the cross-examination of Berry, Board counsel produced for the first time the official register for teacher attendance, although petitioner's counsel had throughout the lengthy discovery period sought records showing which teachers had taught specific classes for the time period 1982-83, and which teachers had taught Reimer's class after her transfer. It developed that inaccurate recollections and hearsay of these facts had been used in providing the Board's discovery. After a brief review, Berry was asked to interpret these records. He was not fully able to do so, and they did not aid his recollection. It was clear that Richardson had substituted for McMurray, who was only in school for a few weeks in September before going out on maternity leave.

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Richardson was listed as the substitute for McMurray for part of September, October, November and all the way through until February, when McMurray returned. Since Richardson and subsequently McMurray, taught Reimer's fifth grade after she left, Berry strongly suspected that McMurray's class was dissolved. Bethea, whose name was erroneously provided in discovery, was nowhere listed as substituting for any of these teachers.

Iris McMurray and Burt Lazarus (the fifth grade teacher in the classroom next to Reimer's class) were called to testify to clarify these facts. McMurry, who had 15 years of experience, was assigned to eighth grade in September 1982, but took extended sick leave and returned February 7, 1985 (4T14:12 to 15:2). When she returned, she was given Reimer's fifth grade class which had been taught by Richardson, who had been a substitute in the 13th Avenue School for about three years. McMurray's eighth grade class had a low enrollment and was dispersed to other classes at the time of teacher transfer in early December 1982. McMurray testified that the fifth graders she got were not educationally restricted, but to the contrary, several of them tested as high as could be and were put into the highest grouping. (4T28).

Burt Lazarus testified that McMurray and Richardson taught Reimer's fifth grade class after she left and he could not recall any other person teaching that class. His class was the closest to Reimer's and they often worked together (4T6). Lazarus observed that the majority of the children in Reimer's class showed signs of being very upset when she was transferred. Some cried and asked why this should have to happen. Lazarus tried to console them and eventually they accepted the change (4T8-9).

When Berry was recalled to the witness stand for cross-examination he was questioned about the number of absences recorded for teachers other than Reimer. McMurry, for example, had only five sick days left when she returned to work although she had taught in Newark for 15 years. Berry had no recollection of exactly how many times teachers were absent or when absences of teachers had occurred. Berry admitted that one of his vice principals (Geiser) recommended a Mrs. Smith for transfer, but he decided not to transfer her. He was asked about the evaluations of teachers

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recommended for transfer. All received satisfactory evaluations although Berry admitted at deposition that he had some criticisms of these teachers. Berry explained that all evaluations were composites of the opinions of more than one administrator and that a teacher might be evaluated as satisfactory under Board standards, but that the teacher's performance might not meet his own standards (4T59-71).

A substantial part of Berry's cross-examination was addressed to determining that there were only one or two documentary items in petitioner's personnel file which evidenced criticism of her service and that these were minor. Berry suggested such items, if any, would be more likely to be found in the vice principal's file. Berry was then asked why he never went to Reimer, in a friendly way, to ask her to cut down on her absences, not to put students in the hall and not to leave so early. Berry testified that the union contract would not permit him to speak to a teacher in this way since a union representative had to be present whenever criticism is given and his comments might be interpreted as harrassment (4T92:9-12; 97:14-to 98:10).

Berry testified that there were no disciplinary complaints against any of the transferred teachers. None had been spoken to by their administrators (4T102-103). Grievances for disciplinary reasons are simple matters. Transfers require consideration of a multitude of factors (4T:104). But for the fact that the central office required Berry to transfer three teachers in December 1982, he would not have done so, and had no authority to do so (4T107). The principal simply makes the selection of a teacher and determines which classes shall be consolidated (4T110-111). Since McMurray's eighth grade class was dispersed, substitute Richardson became available to take Reimer's class until McMurray returned from leave (4T114-117). The classes of three teachers were dispersed to release three teachers for transfer, but Reimer's class was left intact and McMurray was assigned to it. (The contract required that she be returned to a previous grade assignment. J-5 at page 43.) Substitute Richardson taught about two weeks in December (until Christmas) and a month in Janaury until McMurray returned on February 7 (4T 121). Berry had no option to choose either Richardson or McMurray for transfer (4T122:6 to 123:16).

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The Board called Dr. Sanford Lewis, its medical consultant, who had examined Reimer as a result of her workers' compensation claim of aggravated ulcerative colitis. Dr. Lewis received the facts of Reimer's past history from her and included them in her report. He was of the opinion that the precipitous transfer in December 1982 contributed to Reimer's colitis. When he wrote the report, however, it was with the belief that Reimer had a miscarraige and D & C at Newark Beth Israel Hospital on October 24, 1983. In fact, this occurred five weeks before the transfer in 1982, not in 1983. Dr. Lewis was of the opinion that the miscarriage as well as the transfer had a causal relationship to exacerbation of Reimer's colitis condition in December 1982. "Both were unpleasantnesses and both unpleasantnesses could have combined to do that." (4T 138).

The Board called one rebuttal witness to controvert Reimer's testimony that she never placed students in the hallway for disciplinary reasons. D.E., who was one of the students who figured in the disciplinary incident and whose mother had lodged complaints about Reimer, testified that she had placed him in the hallway a lot of times and he would be there about a half an hour. (D.E. is now about 16 years of age, but had been 11 or 12 years old at the time) (4T44-45).

On rebuttal, Reimer testified that neither Berry or Curry asked her for her grade book or lesson plans before she left the 13th Avenue School on December 3, 1982, and that she was not given class coverage during school hours to clear her personal materials out of the classroom. She claimed that the other two teachers were given coverage to do this (5T82). She reiterated that she placed children in the doorway of her classroom at times, to wait for her to speak more privately about their problem behavior, so that they would not be embarrassed before the other children.

After being told she was transferred, she returned to her classroom distraught and crying, so that she had to explain to them she was leaving and someone else was replacing her. "And I did a lot of crying and weeping in front of my class. And I excused myself and went to stand by the doorway so they wouldn't see me. They were very upset." (5T85).

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Reimer also testified that she always got permission to take her class to the playground (5T:85).

Finally, the Board asked petitioner about a document in her handwriting which, it developed, was work product erroneously supplied to the Board in discovery. The Board sought to question Reimer about it alleging it was contradictory to her prior testimony. Reimer wrote it after having spoken to persons at the school to determine who was teaching her class. R-417 was a list. The fourth item was: "Filling my position with a sub so they can save Iris McMurray's job when she comes back from maternity leave." Reimer testified she was told this by someone at the school.

Discussion of Testimony

All of the witnesses were telling the truth as best each could recall it. Due to the passage of time since December 1982, all the principal witnesses, Berry, Curry and Reimer, had some areas which they could not recall. This was particularly true of Curry. Principal Berry did not recall details, but remembered his reasoning in choosing Reimer for transfer and was quite convincing. I had a sense that both Reimer and Berry did not fully articulate their thoughts and intentions because of a desire to maintain good relations.

The first real "break" in the testimony came when the teachers' time record book was analyzed. The book was kept in terms of teacher positions existing at the 13th Avenue School. It showed what the witnesses could not recall: what happened to the positions after the transfer. Three positions disappeared, including Reimer's position. Prior to taking sick/maternity leave, McMurray started the term with an eighth grade class with low enrollment. Shortly thereafter, Richardson, a substitute, took over the eighth grade class until its students were dispersed to other eighth grades on or about the end of the first week in December 1982. Two other undersized classes were treated in a similar manner. This explains why the other two transferred teachers had time to clean out their desks: their students were dispersed to other classes by Friday or even a day earlier, whereas Reimer's class was kept intact and continued under her direction through Friday of that week. While Reimer's position disappeared from the book, the

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McMurray/Richardson position continued with Reimer's fifth grade assigned to it until McMurray came back February 7, 1983, just after mid-term.

Berry could not transfer a teacher from the eighth grade class that was dissolved: he had no right to transfer Richardson, because she was a substitute and could go where she pleased; he could not transfer McMurray because the central office needed "a body," not a paper teacher who was on leave. Secondarily, as to McMurray, she had certain rights under the negotiated contract: a teacher on maternity leave must be reinstated at any time upon request and a teacher returning from leave must be returned to his or her previous grade assignment. (J-5, page 42, section 3B and page 43, section 6,B). While it is true that the latter section says "previous grade assignment," McMurray's testimony made it clear that eighth grade was more strenuous than fifth, so that she preferred the latter. Thus it was necessary for Berry to transfer one teacher whose class remained intact in addition to the two whose classes were dispersed. Of the two teachers recommended by his vice principals (Smith and Reimer), Berry chose Reimer for a number of reasons, none of which were related to the 1980 and 1981 incidents which Reimer initially speculated were a basis for retaliatory action. Berry could not even recall Reimer's letter complaining about a lack of adminstrative assistance with a particular student and never thought of the 1980 occasion when Reimer called the police.

In his cross-examination of Curry and Berry, counsel tried to determine whether or not the reasons given by these administrators for choosing Reimer to transfer were corroborated by specific facts. These administrators had not made a study of each teacher's statistics or personnel file in the few days they were given to make a choice. They depended upon their general knowledge and impressions rather than documentation. While it is true that an act may be arbitrary if based upon facts which turn out to be nonexistent, the issue in this case has always been whether or not the intent of those responsible for petitioner's transfer was retaliatory. Such intent did not appear. The questioning suggested that if the administrators were critical of any conduct of petitioner, they were obligated to state their criticism to her in writing or orally, and not having done so, their action to transfer must have been a disciplinary action. The logic leading to this deduction is not persuasive, despite the eloquent argument of counsel.

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My findings of fact below include only those which were operative in bringing about the transfer. I will not reiterate all those facts detailed above which proved not to be related to the actions of the Board.

Findings of Fact

1. After receipt of the September 30 enrollment records, in October and November of each school year, the Newark Board's central office administrators study the school by school enrollment figures and approved staffing requests of principals to determine which schools need teachers and which schools have excess teachers.

2. When the number of students per class exceeds the optimal (See J-5, page 23, class size), a new class may be started up and staffed with a substitute teacher until a permanent teacher can be transferred to it from another school.

3. By November 1982, Principal Dasher of the Madison Avenue School was given permission to open up a new fourth grade class, which was staffed with a substitute.

4. The Board's central office enrollment statistics for September 30, 1981, 1982 and 1983 showed the following comparison between the 13th Avenue and Madison Avenue Schools: 13th went from 1,523 to 1,435 to 1,367; Madison went from 913 to 929 to 957. In 1982, there were more children in the fifth grade at 13th Avenue School than in any other grade, however.

5. Having reviewed the September enrollment figures, at the end of November 1982, Administrative Supervisor Ruth Hazelwood called Principal Berry of 13th Avenue School and told him he would have to "excess" three teachers by consolidating classes or dispersing students among several classes.

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6. Hazelwood asked Berry to make the choice posthaste and let her know in a few days since these teachers were needed elsewhere in the system; she did not advise Berry how to make his choice, since this is left to the local school principal's discretion.

7. Berry requested three of his vice principals to recommend names of teachers for transfer: Curry recommended two, one of whom was Reimer; each of the other principals recommended at least one name.

8. Although Berry had the final choice, it was his practice not to initiate choices; his school was the largest in Newark and the vice principals were the immediate supervisors of the teachers having more specific knowledge of each than Berry had.

9. Berry conferred with his vice principals and discussed the reasons for their choices. By December 1, the decision was made to transfer Woods, Tyrell [sic] and Reimer.

10. Berry and Curry met with Reimer to advise her that she would be transferred; on Friday, December 3, she visited Madison Avenue School and on Monday, December 6, she reported there where she was assigned to the fourth grade.

11. Reimer was shocked when told of the transfer. At her conference with the administrators, she made three brief notes on an envelope regarding the reasons given to her. As soon as she left the men, she called her union representative for legal advice, and when she returned to her fifth grade classroom, she was distraught and crying a lot, which caused her students to become disturbed, particularly when she explained that it was because she was being forced to leave them.

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12. At the conference with Reimer, Principal Berry felt obligated to give Reimer some reasons for choosing her for transfer because he had been somewhat friendly with her, they lived in the same neighborhood and she knew his son, who had visited her classroom; Berry had no duty to explain since the negotiated contract specifically provided that a teacher would receive an explanation in writing from the Department of Personnel if he or she made a request for it. (J-5, page 28, C2). Reimer never made a written request for official reasons.

13. Reimer's notes taken at the conference list the following reasons for transfer: "(1) looking for favors; (2) dismissal early (3) youngsters standing in hall for disciplinary reasons . . . in car at 2:45 each day."

14. One additional item which Berry is sure he mentioned and which Curry also believes was mentioned was not on the list: excessive absenteeism.

15. Both Berry and Curry agreed that Reimer was one of their finest classroom teachers and that in no way had they chosen her because of any deficiency in that regard.

16. Berry explained that because of the friendly conversations he had with Reimer now and then in the neighborhood and the fact that his son liked to visit her classroom, Reimer would occasionally approach him to ask if she could leave early. He granted these requests but he felt he had lost a degree of objectivity in regard to her and felt she would be more effective in a smaller school with closer supervision.

17. Berry also felt that Reimer had not contributed to the school community above and beyond her required working hours; for example, she did not attend night PTA meetings unless she was required to do so and seemed to be in her car at 2:45 p.m. every day.

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18. Closely akin to the above community-related concern was the fact that an individual in the local school community and one or more teachers had complained that Reimer sometimes seemed to talk down to the parents and students. While Berry had never observed this himself, school/community dissatisfaction of this type indicated to him that the teacher might be more effective in another school.

19. Vice Principal Curry was the source of Berry's statement that Reimer would sometimes place children in the hall for disciplinary reasons. Berry himself had not observed it, but he was very sensitive to Curry's opinion, since Curry was a closer observer of the teachers under him. Berry felt that the relationship between Curry and Reimer was not optimal and that Reimer sometimes "went around" Curry and came to him directly because of her friendly relationship with him.

20. Finally, it was Berry's impression that Reimer had hardly any accrued sick days left although she had been in the Newark system for years and could have accumulated 165 sick days; this indicated to him that Reimer must have been excessively absent.

21. In fact, during the 11 years Reimer had taken at least 2 long term sick/maternity leaves and sick leaves for ulcerative colitis (3 months in 1979); in 1980-81 she took 20 scattered sick days and 3 personal days; in 1981-82, she took 14.5 sick days and 2.5 personal days; and in 1982, during September through November, she took 4.5 sick days and experienced a miscarriage, a fact which indicated that another maternity leave was within contemplation. She did take another maternity leave while at Madison Avenue School and claimed that she could not work between December 6, 1982 and June 1983 after her transfer due to ulcerative colitis.

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22. Reimer speculated that Berry's real reasons for designating her for transfer were: that she had asked for a sabbatical; that she had called the police to the school in May 1981 contrary to school policy, and that she had written a hostile note to Curry when reproved; that she had asked for administrative action about ten months later when she observed a student carrying a gun; and that she had written a strong letter in October 1982 criticizing the administration for failure to assist her with a disciplinary problem and indicating that a copy was being sent to the superintendent.

23. None of the reasons Reimer suggested as the real reasons for her transfer were in any respect a cause for her choice as a transfer: the last and most serious incident was not even recalled by Berry and there is a strong possiblity that he never read the letter at all.

24. When Berry was directed to transfer three teachers out, due to declining enrollment, students in three classrooms were dispersed to other classes, but there was no teacher available for transfer from one of these classes because the permanent teacher (McMurray) was on sick leave and the substitute teacher (Richardson) was not subject to involuntary transfer.

25. Berry was therefore required to choose one teacher from a class which would continue on, but he felt confident that the children would be only minimally disadvantaged because he had an experienced substitute who could be placed there (Richardson) and one of his best teachers (McMurray) would take over the class in about six working weeks.

26. None of the reasons why Berry and Curry preferred Reimer for the transfer stemmed from criticisms of her classroom performance which would ordinarily be the subject of a written reprimand or would rise to the level of an adverse remark on an evaluation: in 1982 and in

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earlier years, administrators were not permitted to consider absences of 18 days or less as excessive and the other reasons, except for the complaint of placing students in the hall, were related to interactions with the school/community which suggested Reimer might be more effective in a different setting.

27. Although there may have been some educational detriment to Reimer's fifth grade class, if another permanent teacher had been chosen for transfer, the result would have been the same for a different class and, in any event, there would have been a corresponding benefit to the fourth grade class at Madison Avenue School if petitioner had not suddenly taken sick leave until the end of that school year.

Conclusory Finding

28. The 13th Avenue School administrators had no retaliatory intent when they chose Reimer for transfer, they had valid reasons for doing so, and they were requred to transfer teachers due to shifts in enrollments.

Conclusions

Petitioner relies heavily on Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144 (1978), specifically on the holding that the impact of a transfer on a teacher is an aspect of the transfer decision which "is insignificant in comparison to its relationship to the Board's managerial duty to deploy personnel in the manner which it considers most likely to promote the overall goal of providing all students with a thorough and efficient education." Id., 156. Petitioner's contention is that the method of transfer seen here is detrimental to children's education.

Assuredly, a more educationally sound and sensitive way of dealing with transfers might be possible. It would be most efficacious if enrollment data were fully known so that the number of teachers needed in each grade of 70 schools could be determined at the start of school in September. Small school systems with homogenous and nontransient

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neighborhoods might be able to manage that. At the very least, one would hope for a speed up in Newark so that changes would be accomplished by October. Would this accomplish continuity of instruction, however? It would bring improvements, but when teachers can continue with the amount of absenteeism seen here, without adverse evaluation and disciplinary action and achieve full seniority for the year by their presence on 90 days (J-5, page 42, 3D, for example) and when no investigation is made as to whether or not a teacher on long-term sick leave for many months is actually disabled within the meaning of the statute, the Board's transfer policy can hardly be singled out as an arbitrary and unacceptable cause of discontinuity.

Should a Board have to litigate or grieve transfers before accomplishing them? On the facts of this case, there was need for a new class in one school before a permanent teacher could be obtained. Management prerogatives had to be exercised. It does not seem unreasonable that the Board should seek an excess teacher from another school as soon as possible. It was not the fault of the administrators that they could not use a substitute (a non-contract teacher) or a teacher on sick/maternity leave as a subject for transfer. In fact, to some extent, fault lies with the negotiated contract since it guarantees that a teacher out on leave can come back to the same grade assignment (as Reimer did for two weeks at the end of June 1983). This provision tends to promote discontinuity before the end of a school year and at the beginning (McMurray taught for only a few weeks at the beginning of the year in September, which guaranteed her ability to return to the same spot).

Petitioner takes the position that every criticism of a teacher must be the subject of a disciplinary action or documented in an evaluation or else it is not cognizable. This appears to be an unrealistic view since every reason why an administrator prefers one teacher to another could be viewed as a criticism. In so large and diverse a system as Newark's, it is simply impossible for a central office bureaucracy to know the conditions and teachers at each school. It is particularly reasonable in such circumstances, for the local principal to be given discretion to weigh the nuances of teacher/parent/school/community relations and make a judgment as to whether or not a satisfactory classroom teacher might be more effective in a different setting. Assuredly

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it would not be reasonable to base a transfer choice on the degree of excellence of a particular teacher. The children in one school have just as much right to a good teacher as the children in another school. Thus, the argument that petitoner was one of the finest classroom teachers in the school appears to be irrelevant.

In fact, the attention of the principal to good administrative, school and community relations is not without precedent. The Board has stated standards in one of its contract provisions concerning transfers. Selection for voluntary transfers are to be made, inter alia, considering "integration of staff and the welfare of children and the community." (J-5, page 27, Sec. 8, A, 3). The reasons which Berry focused on are arguably within these considerations, perhaps consciously and perhaps unconsciously. Berry testified that he had not seen the contract for a long time and he did not cite this section for his standard of choice. In fact, no party mentioned this contractual standard.

Transfer is a managerial prerogative of a local Board. As Board counsel points out, the decision is entitled to a presumption of correctness and will not be upset unless there is an affirmative showing that such decision was arbitrary, capricious and unreasonable. Parsippany-Troy Hills Ed. Ass'n v. Bd. of Ed. 188 N.J. Super. 161, 167 (App. Div. 1983) certif. den., 94 N.J. 527 (1983). Petitioner did not carry that burden of proof. The facts in this case show that petitioner's transfer was not patently arbitrary, without rational basis or induced by improper motives.

In a system of this size, it seems more rational to delegate discretion to the local school principal than to have the central office make a transfer determination. A central office would have to ignore all personal, class (students) and community attributes because it would have no way of knowing them. In this case, selection of the teacher for transfer showed no abuse of the discretion delegated.

It is therefore **ORDERED** that the petition be **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman

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does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

DATE Apr 4, 1986 — Naomi Dower-LaBastille, ALJ

DATE — Receipt Acknowledged; DEPARTMENT OF EDUCATION

DATE APR 9 1986 — Mailed To Parties: FOR OFFICE OF ADMINISTRATIVE LAW

jrp/e

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JANE REIMER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF NEWARK, ESSEX COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon examination of the matter, the Commissioner adopts the initial decision as his final determination in the matter for the reasons expressed therein. An error is noted in the initial decision, ante, with respect to seniority credit for maternity leave (J-5, page 42, 3D). It is incorrectly stated in the decision that the entire year counts toward seniority credit if a teacher has completed 90 days of work in a given year. A review of the provision indicates that a full year is credited for salary placement purposes, not for seniority purposes. Such action is within a board's discretion. Had it been seniority credit, however, such a provision would have violated N.J.A.C. 6:3-1.10(b).

The Commissioner is in complete agreement with the ALJ's criticism of the contract provision which requires that a teacher returning from leave be placed in the same grade assignment. (J-5, page 43, Section 6B; see the initial decision, ante.)

Such a provision, in the Commissioner's judgment, contravenes and usurps the Board's management prerogative to assign staff members within the scope of their certification. As stated in Mary L. Kinney v. Board of Education of Sparta, decided February 1, 1984, "The transfer and/or assignments of teaching staff members as a legal exercise of its managerial prerogative consistent with statutory and decisional law is ***well established.***" (emphasis supplied)(Slip Opinion, at p. 3) Therefore, it must be expressed that the assignment of staff upon return from leave is not a matter subject to the negotiation process.

Notwithstanding the above, it is determined that the conclusions reached by the ALJ in this matter are supported by the record and the decision itself adequately addresses the issues upon which the matter was remanded by the Appellate Division for plenary hearing. Accordingly, the matter is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

May 22, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9257-84
AGENCY DKT. NO. 484-11/84

JOYCE ANGERSBACH,
Petitioner,
v.
HAZLET TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Stephen B. Hunter, Esq., for the petitioner (Klausner & Hunter, attorneys)

Robert H. Otten, Esq., for the respondent (Crowell and Otten, attorneys)

Record Closed: February 26, 1986 Decided: April 10, 1986

BEFORE **AUGUST E. THOMAS, ALJ:**

Joyce Angersbach, petitioner, is a tenured teacher employed by the Hazlet Township Board of Education (Board) who asserts that the Board has illegally withheld her salary for the months of September and October 1984 because she was eligible for sick leave benefits during that time. The Board denies that it owes petitioner any sick leave disability benefits stating that she has been properly compensated and that her accumulated sick days remain for her use at some future time.

After filing this appeal with the Commissioner of Education on November 26, 1984, the matter was transferred to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was conducted in the

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Office of Administrative Law on February 11, 1985. Thereafter, petitioner filed a Motion for Summary Decision with Affidavit and exhibits. Respondent filed a brief in opposition to petitioner's Motion for Summary Decision with one exhibit. Petitioner then filed a reply letter memorandum and respondent filed a letter brief in response to the reply memorandum on July 24, 1985, at which time the record on motion was closed.

On September 3, 1985, I signed an Order denying Summary Decision and directing that the parties proceed to hearing on the merits. On September 16, 1985, the Commissioner adopted the Order and directed that the matter proceed to a hearing. A hearing was conducted on October 23, 1985 in the Marlboro Township Municipal Building, Marlboro. Fifteen documents were admitted as evidence and three witnesses testified. Counsel filed letter briefs and reply briefs the last of which was received on February 26, 1986.[1]

PROCEDURAL HISTORY

In my judgment, the salient facts are not in dispute; therefore, they are set forth as follows.

1. Petitioner is a tenured teacher employed by Board who was the subject of a reduction in force (RIF) and did not work in the 1983-84 school year. She was placed on a preferred eligibility list.

2. The superintendent called petitioner by telephone on August 4, 1984, and notified her of a vacancy in the Lillian Drive Elementary School for the 1984-85 school year. She accepted the position orally, and was directed to contact the school's principal concerning her assignment.

4. On August 14, 1984, petitioner visited the principal in his office. She was eight (8) months pregnant at that time.

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[1] The ALJ was on sick leave during the month of January 1986.

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5. Petitioner advised the principal that her baby was to be delivered on September 15, 1984, and that she intended to set up her class, work from the beginning of school for one week, then take a six to eight week maternity leave of absence.

6. The principal advised her to check with her teachers' union and he advised her to notify the superintendent that she was pregnant.

7. On August 20, 1984, the Board resolved to employ petitioner for the 1984-85 school year. She was notified of this action by letter from the Board secretary on August 21, 1984 (J-1, J-2). Petitioner signed a statement of reemployment on August 24, 1984 (J-12).

8. Petitioner did not notify the superintendent of her pregnancy until August 28, 1984 (J-3). Her notification was prepared on August 24, 1984 and delivered by petitioner's husband on August 28, 1984, on his way home from the hospital. Petitioner's water broke at 6:00 a.m. Her husband stayed at the hospital with her until noon. The baby was born that evening.

9. Although petitioner prepared her note on August 24, a Friday, she decided to deliver it personally rather than mail it. However, she failed to do so and on Monday, August 27, "something unexpected came up" and petitioner was unable to deliver the note. In her note (J-3), petitioner advised the superintendent of her pregnancy and for the first time, her intent to work for one week then take a six-to-eight-week maternity leave utilizing her accumulated sick days.

10. The superintendent learned on, or shortly after, August 28 that petitioner had given birth to her first child. On August 31 he congratulated her by letter and advised that her request for maternity leave was no longer appropriate since she had given birth prior to the beginning of the school year (J-4). Other teaching staff was assigned to cover petitioner's position.

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11. The superintendent concluded (J-4) as follows:

> You are advised that a contractual position will be available to you upon certification of your doctor as to when you will be able to begin employment for the 1984-85 school year. Please contact me as soon as you have received this written document and I will advise you of your assignment for the balance of the school year. In the meantime, we shall assume that you are not available to begin employment as of September 4, 1984 and will act accordingly. (School began on September 4, 1984).

12. Petitioner was unable to attend on the first day of school September 4, 1984.

13. By letter of September 18, 1984, the Board denied petitioner's request for a maternity leave of absence (J-6).

14. Petitioner advised the Board Secretary by letter of October 1, 1984 that she had signed a contract for the 1984-85 school year; therefore, she was eligible for use of her accumulated sick days. She demanded her salary (J-7).

15. On October 15, 1984, the superintendent notified petitioner that her position would be available to her on November 1, 1984, as she requested, upon his receipt of her physician's approval that she may begin employment (J-8).

16. Petitioner provided a physician's note (J-10) and commenced her teaching assignment on November 1, 1984 (J-11A).

17. She accepted her position with a pro-rated salary effective November 1, 1984, under protest (J-11B).

This litigation followed.

I adopt the foregoing as my FINDINGS OF FACT.

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ISSUES

Given the above facts, the issues to be decided are (1) whether or not petitioner is entitled to a two-month (September-October) maternity leave of absence utilizing her accumulated sick days;[2] and (2) whether or not petitioner held an employment status with the Board effective September 1, 1984.

CONCLUSIONS OF LAW

In my judgment the threshold issue in this matter is petitioner's employment status with the Board on September 1, 1984. Was she employed at that time?

The Board claims it offered petitioner a contract effective September 1, 1984, which she was unable to perform; consequently, she was not in its employ on September 1 and no benefits were forthcoming. Petitioner argues that she was reemployed when she accepted the Board's offers. She had notified the superintendent orally on August 4 and received written confirmation that the Board acted at its regular meeting of August 20 reemploying her (J-1). As a result she demands all the protection and benefits to which she is entitled under her accumulated sick leave days.

I do not believe that petitioner was under a contract per se on September 1, 1984. Generally, teachers are offered three, one-year contracts and upon the beginning of their service in the fourth year come under the statutory protection of tenure (N.J.S.A. 18A:28-5). No further contracts are issued; rather, tenured teacher's receive a statement of salary in each succeeding year. In the spring of each year when non-tenured teachers sign a contract, and when tenured teachers sign a statement of salary, they are engaged to perform teaching duties effective September 1 of the coming school year.

Decision law sets forth a differentiation between the terms, employment, and service. Employment may be defined as being engaged to perform teaching duties, while service is the actual performance of those duties. During the summer months, teachers are employed but they are not serving. During summer months, tenured teachers are

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[2] The Board did not deny that petitioner has sufficient accumulated sick days to cover an eight-week leave of absence.

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obligated by statute to give the Board 60 days' notice of intention to terminate their employment (N.J.S.A. 18A:28-8). Non-tenured teachers have a termination clause written in their contracts. Absent any notice of termination, their employment status continue.

The major case illustrative of the distinction between employment and service is Canfield v. Bd. of Ed. of Pine Hill, aff'd. State Bd. of Ed. April 5, 1967, 1966 S.L.D. 152; aff'd. New Jersey App. Div., 1967 S.L.D. 345; rev'd. New Jersey Supreme Court, 1968 S.L.D. 255 (for the reasons set forth in the dissenting opinion of J.A.D. Gaulkin).

Canfield was originally employed as a teacher under contract from November 19, 1962 to June 30, 1963. She received three succeeding contracts for the school years September 1, 1963 to June 30, 1964; September 1, 1964 to June 30, 1965; and September 1, 1965 to June 30, 1966. The 1965-66 contract contained a termination clause which provided that either party may terminate the contract by giving to the other 60 days notice in writing of its intention. On November 15, 1965, four days before Canfield would have acquired a tenured status, she received a notice from the board of education terminating her employment immediately and giving her two months' pay pursuant to the termination clause in her contract. Canfield returned the check for her two months' pay contending that she was entitled to 60 days notice of the board's intention to terminate her and that since she would have acquired tenure during that 60 day period following November 15, 1965, her tenure rights had been violated.

The Commissioner decided for the board of education concluding that it could terminate Canfield's services when it gave her notice, but that it could not terminate her employment until the expiration of the period of notice provided in her employment contract. Therefore, she acquired tenure. Although the State Board and the Appellate Division agreed with the determination of the Commissioner, the New Jersey Supreme Court reversed that decision for the reasons expressed in Judge Gaulkin's dissenting Appellate Division decision as follows:

> It seems to me that tenure and contract are two different concepts; tenure is statutory and arises only by passage of the time fixed by the statute; and the discharge of an employee before the passage of the required time bars tenure, even if the discharge is in breach of an employment contract which, if not breached, would have extended to a date which would have given tenure. Cf. Zimmerman v. Board of Education of Newark, 38 N.J. 65, 73-74 (1962)...

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> If the contract contained no cancellation clause [for Canfield's employment], and the board elected not to permit the teacher to teach beyond the date of notice of dismissal [service], it seems to me the teacher would, at most, be entitled to his salary for the full term of the contract, but not to tenure. If I am correct in this, I see no reason why the result should be different when the contract contains a cancellation clause but the board's notice of dismissal is not given in accordance with the cancellation clause. Suppose here the board had simply discharged plaintiff and not even offered her the 60 days pay? It seems to me that she would then be entitled to the 60 days' pay, under section 11, or, at most, damages for the breach of the contract, but not to tenure.

Thus, the Commissioner's decision, although reversed, is supported in its concept that there is a clear distinction between employment, and service. There is decision law in subsequent years which supports the distinction in these definitions of employment and service. Cf. Martin v. Bd. of Ed. of the City of South Amboy, 1973 S.L.D. 496; aff'd St. Bd. of Ed., 1974 S.L.D. 1412.

Based on the foregoing, I **CONCLUDE** that petitioner was employed in August 1984 when she orally accepted the superintendent's offer that a teaching position was available for her and the Board later made that offer in writing. Although I believe that petitioner manipulated her written acceptance of that offer, and that she deliberately failed to disclose the fact of her pregnancy to her employer, the Board had no option other than to offer her the position for which she was eligible by being at the top of the eligibility list. Petitioner had a statutory right to be offered reemployment when the vacancy became available. In that regard N.J.S.A. 18A:28-12 reads in pertinent part as follows:

> If any teaching staff member shall be dismissed as a result of such reduction [RIF], such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs. . . (Emphasis added).

Accordingly, petitioner accepted her statutory entitlement to the position which the Board was compelled to offer, and she was employed in August 1984 just as much as any other teacher was employed during that summer expecting to return to his/her position in September 1984.

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In a recent decision by the Superior Court of New Jersey, Edison Township Education Association, et al, v. Board of Education of the Township of Edison, Appellate Division, DKT. NO. A-515-84T7 (unpublished) decided February 26, 1986, the court affirmed the decision of the Commissioner and the State Bd. of Ed. which struck down the Edison Board's concept of "natural break."

In Edison, the board of education had a policy which held that returning teachers were not entitled to a position at the time that vacancy occurred; rather, for educational reasons the board determined that the eligible teacher would be placed in the position only at the time of a "natural break," described as the end of a marking period or at the beginning of school after a vacation. In Edison, the teacher involved had been reemployed as a part-time teacher after a RIF in the prior school year. On Monday, September 10, 1984, after three days of school, the board reemployed another teaching staff member with lesser seniority in a full-time position to which petitioner claimed entitlement. Although acknowledging petitioner's seniority, the board denied her the full-time position because it was not available at the time of a natural break. The board of education asserted that it is educationally sound not to disrupt pupils' schedules by appointing a teacher at any other time.

However, the Commissioner reversed that concept and stated that the statute regarding the reemployment of RIFfed teachers placed no artificial limitation on their reemployment; rather, teachers subject to a RIF are eligible for reemployment at the time of the vacancy (N.J.S.A. 18A:28-12). Thus it can be seen from the decision in Edison, supra, that a teacher otherwise eligible for a vacant position must be offered that position at the time of the vacancy and not at a "natural break," or, in the case here under consideration, at some time determined by the Board after the termination of petitioner's pregnancy.

In the instant matter, a vacancy occurred during the summer of 1984 to which petitioner was entitled. When she accepted the Board's offer of employment she was thereafter entitled to all of the benefits enjoyed by any teacher under the Board's employ during the summer of 1984. Although the Board takes a contrary view, had petitioner not been RIFfed and had suffered an illness during the last week of August 1984 preventing her return to school, she could not have been denied the use of her sick leave benefits

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because she was unable to report to work at the beginning of school in September 1984. (Hutchenson v. Bd. of Ed. of the Bor. of Totawa, 1971 S.L.D. 512; Marriott v. Bd. of Ed. of the Twp. of Hamilton, 1949-50 S.L.D. 69, aff'd St. Bd. of Ed., 1950-51 S.L.D. 69).

In Castellano v. Linden Bd. of Ed., 79 N.J. 407 (1979), the Court affirmed, in pertinent part, the determination of the Superior Court, Appellate Division, 158 N.J. Super. 350 (1978), which held that pregnancy is a sickness during the four weeks immediately preceeding and the four weeks immediately following the termination of that pregnancy. Other decisions have extended this limitation provided a doctor's note is presented showing that the pregnant teacher is ill outside the parameters of the thirty-day period on either side of the pregnancy (Hynes v. Bloomfield Tp. Bd. of Ed., 190 N.J. Super. 36) (1983). In Farley v. Ocean Tp. Bd. of Ed., 174 N.J. Super. 449 (1980), the Appellate Division determined that as a matter of law, pregnant teachers were entitled to both accumulated sick leave for the time in which they were actually disabled followed by an unpaid maternity leave, for the purpose of raising the child (Id., at 452).

The cases cited by the Board in support of its position that petitioner was not under contract and therefore not in an employment status are not on point with the facts in the present matter. Further, I have already determined that petitioner held an employment status in August 1984.

Based on the foregoing FINDINGS OF FACT and the law as interpreted by the Commissioner, the State Board, and the Courts, I **CONCLUDE** that petitioner held an employment status beginning in August 1984 and was eligible to use her accumulated sick leave benefits which she requested beginning on September 1, 1984. Petitioner is also entitled to an unpaid maternity leave benefit for the month of October 1984.

Accordingly, petitioner is entitled to her salary for the month of September 1984 by utilizing her accumulated sick leave benefits for that month (Castellano, supra). Further, petitioner is entitled to an unpaid leave of absence only, for the month of October 1984 because she did not at that time, nor can she now, provide a doctor's certificate stating that she was disabled and unable to work during October 1984. Her doctor's note which she submitted in evidence (J-10B) dated October 19, 1984, does not disclose that petitioner was disabled during the month of October 1984. Accordingly, petitioner is not eligible for salary during that month.

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Because the Board determined to deny petitioner's request for a leave of absence (J-4, J-6) she was also denied all of the fringe benefits to which she would have been entitled had she been granted a maternity leave of absence effective September 1, 1984. Petitioner was further denied health insurance coverage until January 1, 1985 which forced her to cover her own medical expenses until that time. Not submitted in evidence but submitted by the Board following the hearing are pages 311-312 of the New Jersey Public Employee Benefit Manual, Division of Pensions, (1983 edition) which states in pertinent part at par. 113.1, that the effective date of local coverage for health benefits to an eligible employee will be the first of the month following two months from the date of employment.

Based on the foregoing, I **CONCLUDE** that petitioner became eligible for coverage for health benefits on the first of the month following two months from the date of her employment. Since I have determined that she was employed effective September 1, 1984 her eligibility for health benefits should have become effective on November 1, 1984. Accordingly, the Board is **ORDERED** to reimburse petitioner for any medical expenses she incurred between the dates November 1, 1984 and January 1, 1985 when she was again included in the Board's medical coverage for its teachers.

Finally, petitioner demands judgment for interest on salary which she did not receive during the period of her unemployment, September 1 - November 1, 1984. Having decided that petitioner was eligible for salary for the month of September 1984 only, she is entitled to interest on that withheld salary until the date of a final decision in this matter (Bd. of Ed. of Newark v. Levitt N. Sasloe, DKT. NO. A-5614-82T2, Superior Court of New Jersey, Appellate Division, decided November 29, 1984) (unpublished); (Marialana Sirianni v. Bd. of Ed. of the Tp. of Howell OAL DKT. EDU 2774-85, decided by the Comm. February 5, 1986).

For all of the above reasons, the relief requested by petitioner is **GRANTED** as modified.

So **ORDERED.**

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

10 April 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

APR 1 [illegible]
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 15 1986
DATE

Ronald J. Parker
OFFICE OF ADMINISTRATIVE LAW

ij

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JOYCE ANGERSBACH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HAZLET, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

Both parties have filed exceptions to the initial decision, as well as reply exceptions, pursuant to N.J.A.C. 1:1-16.4a, b and c.

It is observed that the Board's exceptions to the legal and factual conclusions reached by the ALJ have been addressed at considerable length in the initial decision.

The Board argues that petitioner is not entitled to be rewarded with the use of any of her accumulated sick leave in the instant matter. In support of this position, the Board relies on the record of these proceedings which reveals that on August 14, 1984 petitioner was advised by her building principal to notify her union representative and the superintendent that she was eight months pregnant and that she expected to give birth on or about the middle of September 1984. It further points out that petitioner had not initially given this information to the superintendent when he telephoned her on August 4, 1984 to advise her that a teaching vacancy had occurred for which she was eligible by virtue of her seniority. Instead, the Board claims, petitioner, after accepting the teaching vacancy, deliberately avoided contacting the superintendent from August 14, 1984, until after the birth of her child on August 28, 1984. By that time the Board, on August 20, 1984 had already acted to reemploy petitioner for the 1984-85 school year.

The Board claims that petitioner therefore acted in bad faith and that her misrepresentations caused her to be offered reemployment for the 1984-85 school year pursuant to her position on the preferred eligibility list.

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Moreover, the Board, in taking strong exception to the ALJ's conclusion that petitioner was "employed" as of August 28, 1984 when she delivered her child, argues as follows:

> The fact of her employment could not become real however until she actually physically appeared at the classroom door to begin work on the first day of school. This she could not do and this is what transformed her prior maternity leave request into a child rearing leave request, none of which have ever been granted by the Hazlet Township Board of Education. This point appears to have been missed in the discussion by the A.L.J.
>
> Also overlooked by the A.L.J. is the fact that Petitioner's employment depended upon her ability to accept and perform that employment. This is consonant with the provisions of N.J.S.A. 18A:28-12. These were stressed in Respondent's earlier Brief to the A.L.J. and it is noted that throughout the statute words such as reemployment, dismissed, vacancy, etc. are used. This belies the A.L.J.'s determination that Petitioner had employment before she physically entered the classroom door. Her "employment" depended upon a future performance or event - that was her ability to perform. She was unable to do so and cannot be considered to have been employed in August of 1984. (emphasis supplied)
>
> (Board's Exceptions, at pp. 2-3)

The Board reasons therefore that because petitioner's employment for the 1984-85 school year was conditioned upon her ability to accept and perform that employment as of September 1, 1984, the fact that she gave birth to her child on August 28, 1984, when she was not actively employed by the Board, effectively bars her from the relief she is seeking before the Commissioner. Such relief is the use of her accumulated sick leave for the months of September and October 1984 for disability purposes due to childbirth. The Board considered petitioner's request for a leave of absence due to disability to be a child rearing leave for the months of September and October which it denied on September 17, 1984. The Board maintains that its action is consistent with its policy for such requested leaves of absence and thereby validates its determination not to reemploy petitioner until November 1, 1984. The Board also maintains that petitioner, by virtue of her reemployment as of November 1, 1984, was not eligible for enrollment in its medical benefits plan until January 1, 1985.

Finally, the Board rejects the conclusion reached by the ALJ in awarding petitioner pre-judgment interest for the salary which she was denied during the month of September 1984. The Board argues that its actions were taken in good faith and that there is

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no compelling equitable reason advanced by petitioner to justify an award of pre-judgment interest. The Board contends that such determination rendered by the ALJ flies in the face of the court's determination in Levitt and Sasloe, supra.

The sole exception to the initial decision taken by petitioner reads as follows:

> ***It is respectfully submitted that there is substantial factual and legal support for Petitioner's contention that she was entitled to receive her salary for the month of October, 1984, in addition to the receipt of her salary for the month of September, 1984.
>
> At no time did the Board of Education request that Petitioner supply it with any specific evidence verifying her medical disability during the time period at issue, apart from requesting that she supply the Board of Education with a physician's certificate clearing her for a return to work, effective November 1, 1984. (Exhibit I annexed to Summary Judgment Brief, J-8 into evidence) Nonetheless, Petitioner supplied the Board of Education with a physician's certificate acknowledging the birth of her child on August 28, 1984 which, furthermore, cleared her for a return to work as of November 1, 1984. (Exhibit J attached to Summary Judgment Brief - J10A and J10B into evidence) In a letter dated October 1, 1984 (Exhibit G annexed to Summary Judgment Brief - J-7 into evidence) Mrs. Angersbach, moreover informed the Board of Education that a doctor's note could be supplied, if required by the Board of Education, concerning the issue of her disability status.***(emphasis in text)(Petitioner's Exceptions, at pp. 1-2)

Petitioner relies on Hynes in support of her salary claim for disability leave during the month of October 1984. In this regard the petitioner urges the Commissioner to so modify the initial decision.

In her reply to the Board's exceptions, petitioner objects to the Board's attempt to establish that she was either dishonest or deliberately attempted to conceal her pregnancy status from the superintendent or the Board when she accepted the vacant teaching position during her telephone conversation with the superintendent on August 4, 1984.

Petitioner argues that the record of this matter reveals that she informed her building principal that she was eight months pregnant when she met with him on August 14, 1984. Moreover, petitioner maintains that her letter (J-3) dated August 24, 1984 and delivered to the superintendent by her husband on August 28, 1984

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attests to the fact that she informed the superintendent that she was expecting a child in mid-September and that she was requesting a six-to-eight weeks leave of absence, commencing September 10, 1984.

Petitioner further rejects the Board's contention that because she was unable to perform her teaching duties as of September 1, 1984 because of the birth of her child on August 28, 1984, she was therefore not employed by the Board for the purpose of claiming disability leave due to pregnancy through the use of her accumulated sick leave. Petitioner argues that the Board's tortured "logic" in this regard is contrary to the provision of N.J.S.A. 18A:28-12 which protects her statutory right to employment in the vacancy which she accepted on August 4, 1984.

Petitioner maintains that her request for a leave of absence due to pregnancy under the circumstances recited in the record clearly establishes that she had requested a temporary disability leave of absence, rather than a child rearing leave of absence as contended by the Board.

Petitioner therefore urges the Commissioner to affirm the initial decision for the reasons stated therein by the ALJ with the modification that she be accorded her salary for the month of October 1984.

The Board in its reply to petitioner's exceptions to the initial decision maintains that petitioner was not employed when she delivered her baby on August 28, 1984, consequently petitioner's request for a leave of absence could only be construed as a child rearing leave of absence which the Board has never granted to anyone in its employ.

It is for this reason that the Board argues that petitioner is not entitled to salary benefits through the application of accumulated sick leave for either the months of September or October 1984. The Board, inter alia, is also seeking a reversal of the ALJ's determination that petitioner be accorded salary payment through the use of her accumulated sick leave for the month of September.

The Commissioner has reviewed the respective arguments of the parties advanced herein by way of their exceptions to the initial decision and their replies to exceptions. In the Commissioner's judgment the facts of this matter support the following findings and conclusions.

During the month of August 1984 petitioner, who is tenured in the Board's employ and had been placed on a preferred eligibility seniority list during the 1983-84 school year because of a reduction in force, was notified by the superintendent (August 4, 1984) that a third grade teaching vacancy existed for the 1984-85 school year. Petitioner was offered and accepted the position on that date. The Board through its superintendent therefore initially complied with

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the provisions of N.J.S.A. 18A:28-12 which read in pertinent part as follows:

> If any teaching staff member shall be dismissed as a result of such reduction, such person shall be and remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which such person shall be qualified and he shall be reemployed by the body causing dismissal, if and when such vacancy occurs***." (emphasis supplied)

On August 14, 1984, petitioner met with her building principal; she was eight months pregnant at that time. She informed her principal that she expected to deliver her baby on September 15, 1984 and that she planned to work the first week of the school term which began on September 4. She further informed her principal that she then planned to take a six-to-eight weeks maternity leave of absence. This was the first time that the petitioner had informed any of her superiors that she was pregnant. She was advised at that time to contact her union representative and advise the superintendent that she was pregnant.

Petitioner delivered her baby on August 28, 1984, prior to her expected due date. The Board had officially acted on petitioner's reemployment on August 20, 1984. (J-1; J-2) Neither petitioner nor her building principal had previously advised the superintendent or the Board that she was pregnant and that she planned to request a maternity leave of absence to commence during mid-September.

Petitioner did, however, cause a letter dated August 24, 1984 (J-3) to be delivered to her superintendent on August 28, 1984, informing him of her pregnancy and requesting a maternity leave of absence commencing September 10, 1984 and continuing for approximately 6 to 8 weeks thereafter.

The superintendent's reply letter to petitioner dated August 31, 1984 reads as follows:

> I am in receipt of your letter of August 24, 1984, in which you requested a maternity leave to begin on Monday, September 10, 1984. Since receipt of this letter, however, I am informed that congratulations are in order! I can imagine that you and your husband are very delighted with the birth of your first child.
>
> In view of this event taking place sooner than anticipated, it is apparent that your letter is no longer appropriate. It is, therefore, necessary for me to reassign other members of the staff to cover the teaching assignment at Lillian Drive School.

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> You are advised that a contractual position will be available to you upon certification of your doctor as to when you will be able to begin employment for the 1984-85 school year. Please contact me as soon as you have received this written document and I will advise you of your assignment for the balance of the school year. In the meantime, we shall assume that you are not available to begin employment as of September 4, 1984 and will act accordingly. (emphasis supplied) (J-4)

The Board also acted on September 17, 1984 and denied petitioner's request for a maternity leave on the following grounds:

> ***1. Mrs. Angersbach not employed by Hazlet Township Board of Education in 1983-84 school year.
>
> 2. Mrs. Angersbach is not pregnant having delivered her child prior to September 1, 1984.
>
> 3. Mrs. Angersbach is unable to fulfill the terms of her contract for 1984-85 school year since she cannot begin employment.
>
> 4. In addition, the Board notes that Mrs. Angersbach did not and could not submit a certificate from physician attesting to her pregnancy.*** (J-5)

Petitioner was notified of the Board's action on September 18, 1984. (J-6)

On October 1, 1984 petitioner made the following request in writing to the Board Secretary:

> I am a tenured teacher in this district and after many years of service have also accumulated a number of sick days. I have signed a contract for the 1984-85 school year. I have more than enough sick days to cover my few weeks of absence. I am, therefore, requesting my pay to be forwarded. A doctor's note can be supplied, if required. (J-7)

The Board Secretary replied to petitioner giving her those reasons set down in the Board minutes of September 17, 1984 (J-5) for denying her request to use her accumulated sick leave.

Curiously, petitioner also received a letter dated October 15, 1984 (J-8) responding to her August 24, 1984 letter

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(J-3) to him originally requesting a maternity leave of absence. It reads as follows:

> In your letter of August 24, 1984, you had indicated that you would be absent from your duties for a period of six to eight weeks. The above time period was obviously based on the delivery of your child taking place in mid-September rather than the actual delivery date in August of 1984. If I apply the eight weeks to the latter date, it would appear that you would be able to begin employment for the 1984-85 school year on or about November 1, 1984.
>
> As I had indicated in my letter of August 31, 1984, we are holding a contractual position for you and are using a per diem substitute teacher in the interim. In fairness to the latter person, it is necessary that your apprise me of your plans for the remainder of the school year. Please remember that should you receive your physician's approval to begin employment, it is required that his/her written certification accompany your request.
>
> Your written response to this letter is expected by October 29, 1984. (J-8)

On October 26, 1984 petitioner provided the superintendent with a doctor's certificate. (J-10B)

It is clear from a review of the initial decision, the Board's exceptions and the documents listed above, that the Board in denying petitioner a maternity (disability) leave of absence with the use of her accumulated sick leave, relies on the following reasons:

1. Petitioner had a contractual relationship with the Board for the 1984-85 school year which commenced on September 1, 1984.

2. Petitioner by giving birth earlier than expected on August 28, 1984 was not eligible for a disability leave of absence using her accumulated sick leave, inasmuch as the terms of her contract were not triggered on August 28, 1984, but rather on September 1, 1984. Consequently, the Board considered her request for a leave of absence as a child rearing leave rather than a maternity disability leave of absence. It therefore denied petitioner's request for a child rearing leave of absence as being contrary to their established policy for all teachers.

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The Commissioner does not agree with the position taken by the Board in this regard.

Initially, it must be pointed out that petitioner had previously achieved a tenure status pursuant to N.J.S.A. 18A:28-5. Once tenure has been achieved, it is a legislative status protected by statute and not contractual. Moreover, no such requirement exists within the provisions of N.J.S.A. 18A:28-12 which mandates that tenured persons being reemployed from a seniority list be issued a contract upon their return to employment. The statute of reference specifically mandates that tenured teaching staff members who have been placed on preferred eligibility lists shall be reemployed by a local board of education "whenever a vacancy occurs.***"

It is undisputed that the vacancy for which petitioner was reemployed occurred on or before August 4, 1984 when the superintendent notified petitioner of the teaching vacancy and she accepted such position. The Board also confirmed petitioner's reemployment pursuant to the statutory provisions of N.J.S.A. 18A:28-12 on August 20, 1984.

The Commissioner finds and determines therefore that an employment relationship between the Board and petitioner did exist prior to September 1, 1984, notwithstanding any contract which may have been issued and effected to the contrary or the fact that petitioner had not commenced her teaching duties prior to the time she delivered her baby.

Flowing from that employment relationship was petitioner's right to request a disability leave of absence for maternity reasons using her accumulated sick leave. The Board's contention that petitioner's request could only be construed as a child rearing leave, which it denied on September 17, 1984 for the reasons stated in its minutes (J-5), are clearly erroneous and contrary to the applicable provisions of N.J.S.A. 18A:28-12. Moreover, the facts of this matter clearly establish that petitioner had advised her principal that she was expecting a baby on or about September 15, 1984. However, the baby was delivered earlier than expected. Thereafter, the superintendent was also informed on August 28, 1984, by way of a letter from petitioner dated August 24, 1984 that she was expecting a child in mid-September and that she requested a six-to-eight weeks maternity leave of absence commencing September 10, 1984. Whether the Board or the superintendent should have been apprised of petitioner's pregnancy status between August 14 and August 28, 1984 cannot be solely attributed to petitioner's failure to do so. Her building principal also had the responsibility to inform the Board and the superintendent of his staffing needs prior to the commencement of the 1984-85 school year.

Adding to the confusion with respect to petitioner's failure to provide a doctor's certificate, attesting to her disability due to the birth of her child on August 28, 1984, was the superintendent's letter of August 31, 1984, wherein he informed

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petitioner that her request for maternity (disability) leave was not appropriate. Instead, she was advised to provide a doctor's certificate upon her return to work (November 1, 1984). She did, in fact, provide such certificate as requested on October 26, 1984. (J-10A; J-10B) The Board also contributed to the confusion related to the provision of a doctor's certificate by petitioner when it denied her what it then considered a child rearing leave of absence on September 17, 1984. (J-5)

In fact, the anomaly created by the Board's action had the effect of rescinding her employment as of September 1, 1984 while at the same time it disapproved her leave of absence in accordance with its policy not to grant child rearing leaves of absence. Consequently, petitioner's leave of absence from August 28, 1984 until November 1, 1984 was without Board approval, but at the same time it required a doctor's certificate by October 29, 1984 in order for petitioner to be reemployed after remaining on an unapproved leave of absence.

The Board's actions herein can only be viewed as being contrary to law (N.J.S.A. 18A:28-5 and N.J.S.A. 18A:28-12) which improperly abrogated petitioner's tenure and seniority rights to active employment as of September 4, 1984. Moreover, the Board's denial of petitioner's accumulated sick leave for maternity disability purposes flies in the face of the court determinations of Castellano and Hynes as concluded by the ALJ in the initial decision of this matter.

Petitioner was not only precluded from using her accumulated sick leave during the month of September 1984 for the purpose of disability due to the birth of her child, but she was also improperly denied enrollment in the Board's medical benefits plan as of November 1, 1984.

The remaining issue to be decided is whether the ALJ correctly concluded that petitioner is to be awarded pre-judgment interest on salary for the month of September 1984. It is observed that the ALJ in making this determination relies on the Court's ruling in Levitt and Sasloe.

The Commissioner cannot agree that the Board's action was taken in bad faith which would be the standard to be applied for the award of pre-judgment interest as enunciated in Levitt and Sasloe.

Moreover, this determination is consistent with the recently adopted regulations of the State Board of Education relating to the award of pre-judgment interest.

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The pertinent section of the State Board regulation is set forth in N.J.A.C. 6:24-1.18(c) and reads as follows:

> (c) Criteria to be applied
>
> 1. Pre-judgment interest shall be awarded by the commissioner when he or she has concluded that the denial of the monetary claim was an action taken in bad faith and/or has been determined to have been taken in deliberate violation of statute or rule.

A careful review of the record of this matter does not persuade the Commissioner that the Board's action complained of by petitioner herein meets the above-cited criteria for the purpose of awarding pre-judgment interest. That portion of the initial decision is hereby reversed.

In all other respects, however, the Commissioner affirms the initial decision for the reasons stated therein as supplemented above.

Accordingly, except for the award of pre-judgment interest, the Board is directed to pay petitioner her salary for the entire month of September 1984 utilizing her accumulated sick leave benefits. Petitioner is entitled to an unpaid leave of absence for the month of October 1984 because she did not at that time, nor can she now, provide a doctor's certification of disability for the month of October 1984.

Finally, because petitioner was improperly and illegally denied enrollment in the Board's medical benefits plan as of November 1, 1984, the Board is hereby directed to reimburse petitioner for any medical expenses she incurred between the dates of November 1, 1984 and January 1, 1985, when she was again included in the Board's medical coverage for its teachers.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 27, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8528-84
ON REMAND OF OAL DKT. NO. EDU 7814-81
AGENCY DKT. NO. 422-10/81A
Department of Education

DONALD D. HOWARD,
Petitioners,
v.
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen & Blunda, attorneys)

Thomas S. Cosma, Esq., for respondent
(Connell, Foley & Geiser, attorneys)

Record Closed: February 28, 1986 Decided: April 10, 1986

BEFORE **JAMES A. OSPENSON**, ALJ:

Donald D. Howard, a tenured teaching staff member employed by the Board of Education of Jersey City, Hudson County, was appointed assistant director, Title I program, effective October 17, 1977 and acting director thereof effective December 8, 1980. When he was returned by the Board to the position of elementary teacher effective September 1, 1981, he filed a petition of appeal in the Bureau of Controversies and Disputes of the Department of Education, alleging such return and transfer was violative of his tenure and seniority rights under N.J.S.A. 18A:28-6 et seq. He sought

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reinstatement and differential back pay. The petition was filed October 16, 1981. The Board denied allegations of the petition and raised separate defenses thereto. The matter proceeded to hearing in the Office of Administrative Law under OAL DKT. NO. EDU 7814-81.

After hearing, the petition of appeal was dismissed by the administrative law judge. The Commissioner affirmed in a decision of March 8, 1983. The State Board of Education affirmed in a decision of June 1, 1983. On appeal to the Appellate Division of Superior Court under docket A-5444-82T3, the decision of the State Board was reversed and the matter remanded for further hearings and a redetermination of the issues, in a decision of November 8, 1984. The matter was re-transferred to the Office of Adminsitrative Law on November 27, 1984, under OAL DKT. NO. EDUC 8528-84, for hearing and determination as a contested case, in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, a prehearing conference was conducted in the Office of Administrative Law on April 4, 1985, and an order entered establishing, inter alia, that exhibits in evidence in the previous proceeding under OAL DKT. NO. EDU 7814-81 (except P-5) were stipulated in evidence. The parties were directed to confer with a view towards establishing stipulations of all additional relevant and material propositions of fact, including additional documentation, which thereafter were to be filed in the cause before hearing. Thereafter, it was established that the matters at issue were to be addressed and resolved as if on cross-motions for summary decision in accordance with N.J.A.C. 1:1-13.1 et seq, on pleadings, admissions, stipulations, documentation and memoranda of law. At issue generally, it was established, were the following:

A. Was petitioner appointed to a position requiring supervisory certification and did he serve therein sufficiently to acquire tenure under N.J.S.A. 18A:28-6?

B. When was petitioner's job position changed from civil service to one cognizable under education laws?

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C. By whom and in what manner was supervisory certification required?

D. Does the time petitioner served as assistant director tack-on for acquisition of tenure under N.J.S.A. 18A:28-6?

E. If so, to what position?

The matter came on for hearing in the Office of Administrative Law on January 3 and 6, 1986. Additional certifications, affidavits and documentation were introduced into the record at that time, namely, P-7, P-8 and R-14, by consent. In addition, testimony was adduced by respondent from Louis Acocella, present Hudson County superintendent of schools, in support of his affidavit in R-14. Thereafter, post-hearing submissions having been completed, the record closed.

EVIDENCE IN CERTIFICATIONS, AFFIDAVITS AND STIPULATION

The parties stipulated that Dr. James Y. Gaines left the position of director of the Title I program in November 1980, and was assigned as principal of public school no. 18 in the district. He subsequently left district employment voluntarily.

Petitioner having so certified, and the Board having waived cross-examination, I make the following Findings of Fact from evidence adduced in P-7:

1. When assigned by the Board to the position of assistant director of the Title I program on October 17, 1977, petitioner's duties included participating in preparation of the yearly budget for his entire department, assisting in coordination, integration and evaluation of all existing policies and procedures, assisting in the preparation of the Title I proposals that had to be submitted to the State Department of Education, coordinating the functions of all his field supervisors, collecting reports from field supervisors for submission to the director of the program (at the time, Dr. James Y. Gaines), assisting in preparation, evaluation and submission

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of reports to the State Department of Education, being responsible for recruitment and screening of supplemental teaching staff members, developing in-service training courses for professional staff, consulting with principals, teachers, and the public as to the effect upon the Title I program, assuming overall responsibility for operations of the Title I program in absence of the director, and assisting in supervision of staff (P-7(A)).

2. From time of initial employment as assistant director until June of 1978, petitioner did not perform evaluations of employees whom he supervised, because he did not, at the time, possess certification as supervisor or principal/supervisor. After August 1978, when he received supervisory certification, he performed in addition to other duties listed in finding no. 1, as a supervisor, the duties of observing and evaluating teaching staff members whom he supervised (P-7(C)).

3. A certification of the then superintendent of schools on July 20, 1978, which was part of the Board's application to the State Department of Education for Title I funding, included in petitioner's job description as assistant director assisting the director, and performing all duties listed above and that of assisting "in supervision of staff" (P-7(A)).

4. Thus, from time of receiving his supervisory certification in August 1978, petitioner performed all such duties associated with supervisory personnel including, but not limited to, observation and evaluation of teaching staff members.

5. Evaluated himself by the director (Gaines) on December 14, 1977, petitioner received a good rating for supervision of personnel (P-7(B)).

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6. Thereafter, petitioner was again evaluated by superiors on September 6, 1978 and March 2, 1979, and was rated excellent in the category of supervision and evaluation of personnel (P-7(B)).

7. Random selection of petitioner's evaluations of teaching staff members in 1979 in the Title I program are exhibits in P-7(C); he thus had authority and responsibility for continuing direction and guidance of work of instructional personnel, as defined in N.J.A.C. 6:11-10.4(c).

8. During petitioner's service as assistant director reporting to the director, five coordinators reported to him as assistant director, whose performance he had the obligation of evaluating. The coordinators themselves had the obligation of observing and evaluating teaching staff members who reported to them.

9. Petitioner was appointed to the position of acting director of the Title I program, effective December 8, 1980 (R-6). He remained as acting director from that date until September 2, 1981, when he was reassigned as classroom teacher (R-9). During the period he served as acting director, his duties, job requirements and obligations did not change, and he continued to perform in a supervisory capacity.

10. Petitioner acquired certification as principal/supervisor in February 1980 (P-1(c)). He acquired certification as school administrator in June of 1981 (P-1(d)). Required for certification as chief school administrator was experience for two years in a supervisory and adminstrative capacity. In a letter dated December 15, 1980, an assistant superintendent in charge of personnel verified to the State Board of Examiners that petitioner had been employed since October 1977 as assistant director of the Title I program, and that he had performed supervisory and administrative duties during the entire period of his employment (P-7(D)).

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11. By letter to the Civil Service Commission, dated November 20, 1979, an assistant superintendent for personnel declared the Board had by resolution of September 1977 considered petitioner assistant's directorship in the Title I program, and all other administrative positions within Title I, to be instructional in nature and governed by provisions of Title 18A. It was noted by the assistant superintendent that petitioner had proper certification as a member of the instructional staff, was a member of TPAF and had always been considered a member of the instructional staff (P-7(E)).

12. A Board resolution of September 7, 1977 declared the Title I program to be instructional in nature and transferred its operation to the assistant superintendent of schools in charge of personnel. A Board resolution of November 20, 1979, reaffirmed that resolution (P-7(E)).

13. The Board considered Title I instructional and administrative positions to be cognizable under Title 18A, as least as early as its resolution of September 7, 1977 (P-7(F)). The Hudson County superintendent of schools declared such Title I instructional and supervisory positions should be cognizable under Title 18A officially as early as July 2, 1979 (P-8).

14. The Board conceded that a supervisory certificate was required for the position of acting director, Title I, at least after December 12, 1979.

Called by respondent, Louis Acocella, current county superintendent of schools for Hudson County, testified in support of his affidavit in R-14. Having reviewed exhibits R-2, 3, 4, 5, 11 and 12, and P-7(E), he noted that his predecessor in office, Russell Carpenter, in the course of his duties, mandated sometime prior to October 11, 1979, that administrative positions of the Title I program, including those of director and assistant director, be classified under and treated as positions governed by Title 18A. He noted the Civil Service Commission by letter on December 12, 1979 (R-12), released those

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positions from governance of the Commision under Title II, and that holders of enumerated titles would be covered by Title 18A with the exception of James Gaines, former director of the program, who left the position of director in November 1980. It was his opinion the office of the county superintendent of schools considered the positions listed in the letter of December 12, 1979 (R-12) to be governed by Title 18A as of the date they were released by the Civil Service Commission from the purview of Title II, that is, as of December 12, 1979.

Based on the stipulation of the parties concerning vacation of the Title I directorship by Gaines, I **FIND** that during petitioner's service as acting director from December 8, 1980 until September 2, 1981, the directorship was "vacant" during the time when petitioner filled it as "acting director". It follows that petitioner's service during that period is not disqualified from calculation for acquisition of tenure by N.J.S.A. 18A:16-1.1. See, Zielenski v. Bd. of Ed. Town of Guttenberg, Hudson County, 1971 S.L.D. 664, 665; aff'd. Appellate Div., 1972 S.L.D. 692.

Thus, and I so **FIND**, petitioner's service record from 1978 through 1981, in the consecutively-served positions of assistant director and acting director Title I, can be calculated as follows:

1978-79	assistant director	9/1/78-6/30/79	10 months
1978-79	assistant director	9/1/79-6/30/80	10 months
1980-81	assistant director	9/1/80-12/8/80	3-1/4 months
1980-81	acting director	12/8/80-9/2/81	8-3/4 months
	Total		32 months

DISCUSSION

The Board argued generally that petitioner could not begin to acquire tenure under N.J.S.A. 18A:28-6 until December 12, 1979, when the position of assistant director Title I was "released" by the Civil Service Commission as an educational position not

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governed by Title II. The Board conceded, otherwise, however, that the tack-on principle on petitioner's consecutive service as assistant director Title I and acting director Title I was proper, but argued, nevertheless, even under such tacking-on of positions, petitioner's total service in the two positons was but 20 months, and thus not sufficient for attachment of tenure in the position of assistant director Title I, under N.J.S.A. 18A:28-6. Finally, the Board argued petitioner cannot be tenured in an educational position that did not "require a supervisor's certificate" until December 9, 1979, as suggested by former superintendent Ross, one of the Board's witnesses at the earlier hearing, but conceded that the position then and thereafter did.

Petitioner argued generally that petitioner's two consecutive periods of service as assistant director Title I and acting director Title I did constitute more than sufficient time under N.J.S.A. 18A:28-6 to qualify him in the supervisory position of assistant director Title I. He argued the Hudson County superintendent of schools, the Commissioner's delegee for Title I program administration, as early as July 2, 1979 (P-8) had ruled all Title I teachers had to be properly certificated under N.J.S.A. 18A:26-2, 27-2, and N.J.A.C. 6:11-3.1(a). That date established from the evidential record a recognition that Title I positions did not fall under the jurisdiction of the Civil Service Commission. Petitioner argued further that the Board itself, as early as September 7, 1977 by resolution (P-7(F)), had declared Title I positions subject to education law, in order to insure "a uniform policy of employment." Under either recognized date in 1977 or 1979, it was said, petitioner had accrued sufficient time, and both positions qualified him for tenure as assistant director. As a result, because of a timely filing of petition, it was urged, petitioner is entitled to reinstatement to the position, together with differential back pay from September 2, 1981.

In Spiewak v. Rutherford Board of Education, 90 N.J. 63 (1982), the Supreme Court ruled that:

> "All teaching staff members who work in positions for which a certificate is required, who hold valid certificates, and who have

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> worked the requisite number of years, are eligible for tenure. . .[at 81].
>
> . . .There is no reason to believe that the Legislature, in fact, intended to exclude Title I teachers from the scope of N.J.S.A. 18A:28-5. They are "teaching staff members" under N.J.S.A. 18A:1-1 and teaching staff members acquire tenure if they satisfy the objective criteria in N.J.S.A. 18A:28-5. We find no exception in the statutes that would deny tenure to Title I teachers [at 82].

The facts show that petitioner here served in the position of assistant director Title I in consecutive academic years from September 1978 until December 8, 1980, a period of some 23-1/4 months, and further in the position of acting director Title I from December 8, 1980 until September 2, 1981, a total period of service in both positions of some 32 months. During both periods of service, petitioner held instructional and supervisory certifications. For calculation of eligibility for tenure under N.J.S.A. 18A:28-6(c), tacking-on of the two periods of service as assistant director Title I and acting director Title I is required, since the statute provides that "the period of employment in such new position [for example, as acting director] shall be included in determining the tenure and seniority rights in the former position held by such teaching staff member [for example, assistant director]." See, Flood v. Jersey City Board of Education, 1984 S.L.D. - (Commissioner's decision, January 17, 1984; OAL DKT. NO. EDU 4453-83). That the two positions were cognizable under education law rather than civil service law, I **FIND** is evidenced by the declaration of the county superintendent of schools, as delegee of the Commissioner, at least as early as July 2, 1979 in P-8. That Title I positions were even earlier recognized by the Board as cognizable under Title 18A is evidenced by Board resolution as early as September 7, 1977 in P-8(F). The Civil Service Commission in its letter to the Board on December 12, 1979 in R-12, would seem, under the circumstances, merely to have recognized pre-existent administrative jurisdiction as properly under Title 18A. In my view, the communication by the Civil Service Commission to the Board was not a change of jurisdiction, therefore, and cannot, under these circumstances, effectually shorten the period of time petitioner was employed in a supervisory teaching staff position, when that which is to be calculated is admeasurement of service for acquisition of tenure. Cf. Spiewak, supra, 90 N.J. at 74-5.

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Thus, from all of the evidence, petitioner can be said to have been employed in the questioned period of time for more than two academic years, or 20 months, in the two positions, if during those two particular periods of service he was employed in positions for which supervisory certification was required. It is given that he was so employed during his supervisory service as acting director Title I from December 8, 1980 until September 2, 1981. The question remains whether he was so employed during his period of service as assistant director Title I.

From all of the evidence adduced herein on remand of this matter, which is substantially uncontradicted by the Board and, indeed, stipulated by the parties in P-7, I am satisfied that petitioner's employment service as assistant director Title I involved the supervision and evaluation of professional staff under him, all of whom were teaching staff members, and thus was within definitional standards of N.J.A.C. 6:11-10.4(c) as that of a school officer charged with authority and responsibility for the continuing direction and guidance of the work of instructional personnel. In Epps v. Bd. of Ed., Jersey City, 1979 S.L.D. 627; aff'd State Board, 1980, S.L.D. — (April 8, 1980), reversed App. Div. (unpublished opinion, January 3, 1983, Docket No. A-3171-79-T3), petitioner appealed a Board decision denying him tenure status in the position of supervisor and back pay, which he claimed on the basis of a five-year supervisory service within the Title I program. He was certified as a supervisor and, in the position of coordinator in the program, was supervised and evaluated by the present petitioner. The court said:

> Here, Epps was certified by the State Board of Examiners as a supervisor. He acted in the capacity of a supervisor, and his job specifications prior to 1977 set forth supervisory and evaluative functions. In light of the court's determination in Spiewak that both Title I teachers and Board-appointed teachers are entitled to full statutory benefits, the administrative finding that Epps was not appointed by the Board as a supervisor is not controlling. If Title I teachers cannot be arbitrarily denied the protection of the Tenure Act, neither may their supervisors. If the requisite conditions for tenure are met, it is irrelevant whether or not the Title I teachers are appointed by the Board itself, or by the Director of the Title I program [slip opinion at 6].

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CONCLUSION

Based on the foregoing, having reviewed the exhibits and stipulations, and having heard the testimony, I **CONCLUDE** that petitioner acquired transfer or promotional supervisory tenure as assistant director Title I, under N.J.S.A. 18A:28-6, for successive periods of service as assistant director and acting director Title I for some 32 months from September 1978 until September 1981, a period of more than the equivalent of two academic years within a period of three consecutive academic years. I **CONCLUDE** he was properly certified as a supervisor during both such periods under N.J.A.C. 6:11-10.4(c) and so served despite and notwithstanding job specifications of the Board otherwise so implying in R-13. That is, the nature of the position of assistant director Title I and its functions as assigned petitioner by the Board fixed "the requirement for supervisory certification." As a result, I **CONCLUDE** he was improperly returned to classroom teaching service by the Board on September 2, 1981, at lesser salary, in violation of his tenure rights. Accordingly, I hereby **ORDER** petitioner reinstated to his supervisory position as assistant director Title I program, and **ORDER** that he be accorded differential back pay from date of improper reassignment and transfer on September 2, 1981, to date of final agency head decision herein.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 10, 1986
DATE

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

APR 11 1986
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 14 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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DONALD D. HOWARD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION ON REMAND
RESPONDENT.	:	
	:	

The record and initial decision on remand rendered by the Office of Administrative Law have been reviewed. Exceptions filed by the Board were untimely pursuant to N.J.A.C. 1:1-16.4a and b.

Upon review of the initial decision and additional information brought to the record as a result of the Appellate Court's remand, the Commissioner agrees with the conclusion of the ALJ that petitioner acquired tenure as assistant director Title I under N.J.S.A. 18A:28-6, notwithstanding job specifications otherwise so implying in Exhibit R-13. Exhibit P-7 provides sufficient documentation that, despite R-13, petitioner's duties included responsibilities that are authorized to be performed only by virtue of supervisory certification, not instructional certification. For example:

1. Title I application signed by superintendent in July 1978 attesting to fact that petitioner "[a]ssumes responsibility for overall operation of Title I program in the absence of the Director" and "[a]ssists in supervision of staff." (P-7A) Said application must be approved by Board resolution for submission;

2. Evaluations of petitioner's performance during 1977-1979, entitled "Administrators and Supervisors Evaluation Summary" which assesses his "Administrative and Supervisory Skills" in the supervision and evaluation of personnel (P-7B);

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3. Copies of evaluation summaries executed by petitioner documenting his evaluations of Title I supervisory staff (P-7C);

4. Certification by the assistant superintendent dated December 15, 1980, that petitioner, as assistant director Title I, had satisfactorily performed supervisory and administrative duties since 1977 and was highly recommended for issuance of a school administrator's certificate (P-7D), a certificate which requires successful completion of educational supervisory and administrative experience.

Having served in a position, the nature and functions of which require supervisory certification, for the requisite period of time pursuant to N.J.S.A. 18A:28-6 and being in possession of the requisite certificate establishes that petitioner has met the New Jersey Supreme Court's standard of review for tenure acquisition articulated in Spiewak, supra.

Further, the Commissioner determines that the earlier classification of the assistant director position as a Civil Service position under Title 11 is not a legal deterrent to petitioner's tenure acquisition since it is clear that under Title 18A he has statutory entitlement to tenure, notwithstanding the erroneous placement of the position under Civil Service (Title 11) rather than under Title 18A where it belonged. In other words, the fact that Civil Service did not act to remove the position from its jurisdiction until December 1979 does not serve to deny petitioner his statutory rights under Title 18A since removal from Civil Service was based on a determination that the director and assistant director positions, as well as numerous other supervisory positions, were "instructional" in nature and therefore were not appropriately placed under Civil Service. There is nothing to indicate that the nature of the positions changed to become "instructional," rather it would appear from the record that the Board desired to have them placed under Civil Service until told otherwise by the County Superintendent.

It is clear from the record that, as early as September 7, 1977, the Board recognized that Title I staff belonged under Title 18A. (P-7F) Further, it is also clear that, as early as July 15, 1978, Civil Service itself recognized that various Title I supervisory positions fell under education law, not Civil Service law, but the Jersey City Board Attorney, William Massa, wrote objecting to such determination, indicating that "the Board had always considered those positions as being under the jurisdiction of Civil Service Law and Rules." (R-5) The letter in question clearly indicates that Civil Service is not in disagreement with the County Superintendent's determination that Title I positions fall under

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Title 18A but that formal notification from the Board was needed as to the various positions in question. The letter from Civil Service indicates that it will continue to consider petitioner's position as being under Civil Service until duly notified by the Board. The letter states:

> Our position in this matter has not changed, merely, we are requesting, that you inform us of all the positions and the names of all the employees serving in those positions in the Title I Program that you consider to be instructional in nature and governed by Title 18A.
>
> Upon your submission of this list to us, we will note our records accordingly. However, until such time as you submit this list to us, we will continue to consider the position of Assistant Director, Title I Program, to be covered under Civil Service Law and Rules and we will continue with the certification process against the provisional incumbent in that title. (emphasis supplied) (R-5)

It is interesting to note that Charles Epps (a Title I supervisor whom petitioner evaluated and whose name appears on the listing of individuals Civil Service removed from coverage by Civil Service (R-12) in December 1979) was determined by the Appellate Court to have acquired tenure as a Title I supervisor under Title 18A for service rendered from 1972 to 1977. That decision reversed the determinations of the ALJ, the Commissioner, and the State Board that tenure was not acquired because, in part, the Board at no time had appointed him to a position requiring a supervisory certificate. Also noted is that in Flood, supra, the person who assumed petitioner's assistant director position was found to have attained tenure as a supervisor in that position.

Accordingly, the initial decision of the ALJ is adopted as the final decision in this matter. Petitioner is to be reinstated to the assistant director's position and provided all differential pay owing to him since September 1981, as well as all benefits and emoluments that would have accrued had he not been improperly transferred from a tenured supervisory position to a teaching position.

COMMISSIONER OF EDUCATION

May 27, 1986

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DONALD D. HOWARD,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, March 8, 1983

Decided by the State Board of Education, June 1, 1983

Remanded by the Appellate Division, November 8, 1984

Decided by the Commissioner of Educaton, May 27, 1986

For the Petitioner-Respondent, Oxfeld, Cohen and Blunda
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Appellant, Connell, Foley and Geiser
(Thomas S. Cosma, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

October 1, 1986

Affirmed N.J. Superior Court March 7, 1988

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7335-85
AGENCY DKT. NO. 374-10/85

TRENTON BOARD OF EDUCATION,
Petitioner,
v.
DAVID WILLIAMSON,
Respondent.

Robert B. Rottkamp, Jr., Esq., for petitioner (Rottkamp & Flacks, attorneys)

David R. LaRosee, Esq., for respondent

Record Closed: March 7, 1986 Decided: April 14, 1986

BEFORE BRUCE R. CAMPBELL, ALJ:

The Trenton Board of Education (Board) filed tenure charges against David Williamson, respondent, before the Commissioner of Education alleging incapacity, unbecoming conduct, chronic and excessive absenteeism, absence without approval and abuse of sick leave.

There is no challenge to the procedural propriety of the service of the charges upon the respondent and certification of the charges to the Commissioner of Education. The secretary to the Board advanced the charges to the Commissioner on October 25, 1985, along with a certification that the Board had on October 22, by unanimous vote of the members present, resolved that the charges and the evidence in support of the charges are sufficient to warrant the dismissal of the respondent, pursuant to N.J.S.A. 18A:6-10 et seq.

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The respondent filed an answer to the charges with the Commissioner of Education on November 13, 1985. The matter was transmitted to the Office of Administrative Law on November 18 for disposition as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on December 20, 1985. It was determined that there were no material facts in dispute. The matter was directed to proceed on the Board's motion for summary judgment. A schedule for the submission of documents was established. The Board's motion and supporting papers were due on January 24, 1986, and the respondent's responsive papers were due on February 13. The Board requested and was granted an extension of time in which to file its papers. The Board was granted until February 27 to make its filing; however, its papers were received in this office on February 18. I allowed the respondent 14 days from the date of receipt of the Board's papers in which to file responsive papers. On the fourteenth day, March 4, I received nothing from the respondent. Allowing three days for the movement of mails, I closed the record on March 7, 1986. No submission or request for extension or application for other consideration has been received from the respondent.

I.

The Board contends that the respondent is its employee and has been so employed since November 13, 1977. He is an industrial arts teacher under tenure. The Board certified the above-recited charges against the respondent pursuant to N.J.S.A. 18A:6-10 et seq. on October 22, 1985. The Board determined that, pursuant to statute, it had just cause to seek the respondent's dismissal by the Commissioner because of chronic and excessive absenteeism.

Specifically, the respondent was absent during the last 3 school years for more than 100 days. It is alleged by the petitioner and, for the purposes of this action, admitted by the Board that the respondent was hit in the head by a wastepaper can on January 21, 1985, in his classroom. His position is that this injury justified his not returning to work.

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The respondent's absences may be summarized as follows:

SCHOOL YEAR	TOTAL ABSENCES
1982 - 1983	29 days
1983 - 1984	93.5 days
1984 - 1985	
a. September 1, 1984 to January 21, 1985	17.5 days
b. January 22, 1985 to present	Never Returned

II.

It is the Board's position that the respondent should be dismissed because of his excessive absenteeism. The Board does not claim that the respondent is physically or mentally incapacitated and thereby prevented from performing his duties. Merely, the extent of his absences is so great and the resulting disruption of the educational processes in the school is so extensive as to justify his removal under the just cause provision of N.J.S.A. 18A:6-10. The Board cites in support of its position the respondent's refusal to return to work and his admission that he is not capable of returning to work. The Board does not want a teacher who will not work nor one who claims he is not capable of working.

The respondent admits the attendance figures contained in the charges are correct. He also admits that he is incapable of teaching. It is the Board's position that these admissions alone justify the revocation of tenure and dimissal of the respondent.

It is clear from the charges that the Board's position is based upon the respondent's excessive absenteeism and the effect on the educational environment. It is the respondent who steadfastly holds that he is incapable of teaching.

Incapacity denotes that a person is simply not capable, either by way of mental or physical illness, of performing his duties. Tenure of Bacon, 1978 S.L.D. 776. In the present case, the respondent claims he is incapacitated. The Board makes no such claim.

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The respondent's excessive absenteeism is obvious. Up to the date of the alleged injury on January 21, 1985, the admitted absences over a period of two and one-half school years totaled 140 days. This is an average of 56 absences per year. If the respondent's absences from January 21, 1985 to June 30, 1985, are added, he was absent a total of approximately 240 days in three school years or an average of 80 days per school year.

There is no question that repeated and excessive absenteeism of regular teachers poses a threat to the integrity of the educational process. In Angelucci, et al. v. West Orange Bd. of Ed., 1980 S.L.D. 1066, 1078, the Commissioner states:

> The Commissioner can only sympathize with teachers who suffer from debilitating illness but cannot agree that the continued absence of any teacher has no effect on the pupils. If such be true, the Commissioner is contrained to wonder the need for the presence of the teacher at all, which wonderment reduces to a legal absurdity. Wade v. Empire Dist. Electric Co., 98 Kan. 366, 158 P. 28, 30

Frequent absences of teachers from regular classroom activity disrupt the continuity of the instruction process. The benefit of regular classroom instruction is lost and cannot be entirely regained, even by extra effort, when the regular teacher returns to the classroom. Consequently, many pupils who do not have the benefit of their regular classroom teacher frequently experience great difficulty in achieving the maximum benefit of schooling. The regular contact of pupils with their assigned teachers is vital to this process. Tenure of Reilly, 1977 S.L.D. 403, 414.

In Bundy v. Jefferson Tp. Bd. of Ed., 1981 S.L.D. 186, the Commissioner affirmed the dismissal of a nontenured teacher for absenteeism when she had been absent 55 1/2 days within a 2 3/4-year period.

Clearly, under N.J.S.A. 18:6-10, the Board has just cause to seek the dismissal of the respondent, based upon his excessive absenteeism. In support of the Board's charge and clearly qualifying the excessive absenteeism is the respondent's self-admission that he is incapable of classroom teaching. The Board relies on this admission not to prove incapacity, but merely to qualify the excessive absenteeism of the respondent.

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III.

The respondent has entered no defense in this case other than a general denial of the charges filed on November 14. The Board's petition, therefore, is unopposed. The Board has made a prima facie case as to excessive absenteeism. The respondent has supplied nothing in the way of medical certificates, mitigating testimony or the like to counter the Board's case.

Accordingly, I **FIND** and **CONCLUDE** that the charges filed against David Williamson by the Trenton Board of Education are **TRUE IN FACT.** I further **FIND** and **CONCLUDE** the the gravamen of the charges is such as to warrant revocation of tenure status enjoyed by the respondent.

Accordingly, it is **ORDERED** that David Williamson be dismissed from his position as teacher in the employment of the Trenton Board of Education, effective October 22, 1985, the date upon which the Board certified the present charges to the Commissioner of Education.

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

14 APRIL 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

APR 1[illegible]3
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 17 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID WILLIAMSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY	:	DECISION
OF TRENTON, MERCER COUNTY.	:	
	:	

The record and recommended decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Accordingly, the Commissioner adopts the findings and determination of the ALJ. It is hereby ordered that David Williamson shall be and is hereby dismissed as a teaching staff member in the employ of the Trenton Board of Education effective as of the date of this decision, and it is further ordered that a copy of the final decision in this matter be forwarded to the State Board of Examiners for its review and in its discretion, further appropriate action.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

May 23, 1986

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IN THE MATTER OF THE SPECIAL PUBLIC QUESTION SUBMITTED AT THE ANNUAL SCHOOL ELECTION HELD IN THE TOWNSHIP OF MAPLE SHADE, BURLINGTON COUNTY.	:	COMMISSIONER OF EDUCATION DECISION

The Board of Education of the Township of Maple Shade, hereinafter "Board," has petitioned the Commissioner of Education to make available a supplemental amount of $234,251 in current expense appropriations for the 1985-86 school year through the certification of such additional amount of funds to the Burlington County Board of Taxation to be included in the local tax levy for the 1986-87 school year.

It is observed that, as a result of the annual audit of the Board's 1984-85 school budget expenditures, it was reported on November 12, 1985 (1985-86 school year) that a deficit of $234,251 in current expenses had been incurred during the 1984-85 school year.

This deficit had to be carried over and absorbed in the previously established 1985-86 school budget appropriations. However, there were no additional funds available in the 1985-86 current expense appropriations to cover the budget shortfall.

Consequently, the Board applied for, and was granted, a budget cap waiver from the Department of Education on March 13, 1986 for the purpose of restoring the $234,251 current expense deficit in order to meet its financial obligations for the 1985-86 school year.

The specific amount to be raised was to be included in the 1986-87 local tax levy. However, when this special question was placed on the ballot at the annual school election held on April 15, 1986, it failed to receive voter approval.

The Board maintains that, without the additional amount of $234,251 in current expense appropriations it has requested to be raised in the local tax levy, it would be in noncompliance with the State's constitutional and statutory mandates pursuant to the provisions of Chapter 212, Laws of 1975, to provide a thorough and efficient system of education for the 1985-86 school year. N.J.S.A. 18A:7A-1 et seq.

The Commissioner has reviewed this matter and takes further notice of a letter dated May 14, 1986 from the Burlington County Superintendent of Schools directed to the department's Assistant Commissioner of Finance which reads in pertinent part as follows:

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This letter is to notify you that I strongly recommend the full restoration of the $234,251.00 that Maple Shade School district was attempting to raise by taxes to overcome their deficit. This restoration should eliminate the deficit now existing as reported in the June 30, 1985 audit.

This recommendation is based on the following facts:

1. To cut programs and make up the deficit during the 1985-86 school year would mean that the district would have to close school immediately.

2. The district has cut programs and expenditures during the 1985-86 school year but this will only allow the district to remain within its 1985-86 budget and will not help to overcome the deficit from the prior years.

3. There can be no thorough and efficient education for the students in Maple Shade if the district is forced to cut the 1986-87 appropriations by the $234,251.00 to eliminate the deficit.

Based on these facts I see no other solutions to the problem of Maple Shade's deficit.*** (C-1)

Upon review of the record developed thus far in the instant matter, the Commissioner concurs with the recommendations of the Assistant Commissioner of Finance and the Burlington County Superintendent of Schools that the Board is confronted with an existing $234,251 shortfall in current expense appropriations for the 1985-86 school year.

The Commissioner, therefore, finds and determines at this juncture that it is necessary for the Board to have sufficient funds to meet the constitutional mandate to provide a thorough and efficient system of education for the 1985-86 school year.

However, it is also incumbent upon the Board to maintain expenditures within the amounts originally appropriated.

It is further found and determined that final disposition of this matter may be subject to an adversarial proceeding between the Board and the Township Council of Maple Shade, inasmuch as the special question to raise the supplemental current expense appropriations failed to gain voter approval. Therefore, the Township Council is hereby granted an opportunity to file its answer to the Board's petition within 20 days of the receipt of this decision.

Subsequent to the receipt of the above, the matter will be heard on its merits, including a determination as to the cause or

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causes of the projected deficit, through further proceedings to be conducted by the Office of Administrative Law pursuant to N.J.S.A. 52:14F-1 et seq. If, as a result of such proceedings, it is finally determined by the Commissioner that the actual amount of the Board's projected deficit for the 1985-86 school year is less than the amount of $234,251, the Commissioner will subsequently take appropriate steps to effect a corresponding reduction in the local tax levy for school purposes.

The Commissioner's determination in this matter is grounded on his prior ruling in In the Matter of the Annual School Election Held in the Red Bank Regional High School District, Monmouth County, decided May 7,1981.

Accordingly, the Board's request for a supplemental tax certification is hereby granted. The Commissioner directs the Burlington County Board of Taxation to certify the amount of $234,251 forthwith in the 1986-87 current expense local school tax levy, subject to further adversarial proceedings between the Board and the Township Council of Maple Shade.

The Commissioner retains jurisdiction in this matter until a final determination is rendered pursuant to the provisions of N.J.S.A. 18A:6-9 and N.J.S.A. 52:14F-1 et seq.

IT IS SO ORDERED this 30th day of May 1986.

COMMISSIONER OF EDUCATION

May 30, 1986

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IN THE MATTER OF THE SENIORITY :

RIGHTS OF CERTAIN TEACHING STAFF : COMMISSIONER OF EDUCATION

MEMBERS EMPLOYED BY THE EDISON : DECLARATORY JUDGMENT

TOWNSHIP BOARD OF EDUCATION :

:

The parties in this consolidated matter seek declaratory judgment concerning the application of N.J.S.A. 18A:28-11 et seq. and N.J.A.C. 6:3-1.10 et seq. to the seniority rights of certain teaching staff members. At issue is the propriety of the Board's action to reduce its teaching force as a result of abolishing the district's driver education program, effective June 30, 1985. In so acting, the Board placed three teachers, endorsed in health and physical education and driver education, whose entire service was in driver education on the seniority list for health/physical education This resulted in the "bumping" of three other teachers whose service was entirely within health/physical education. At issue is entitlement to positions as health/physical education teachers for the 1985-86 school year.

A joint stipulation of facts was submitted to the record which is repeated in pertinent part below. The stipulated facts are adopted as findings of fact herein.

***

1. The Board instituted a driver education program effective September 1, 1972.

2. The teachers who taught driver education were all certified as teachers with endorsement in health and physical education and driver education. None of these teachers taught health or physical education.

3. The evaluations of driver education teachers were prepared and signed by the principal with substantial input from the supervisor of health and physical education.***

4. These teachers taught driver education theory classes, which were part of the tenth-grade health and physical education curriculum, but did not teach any other portions of health and physical education curriculum.

5. Physical Education department head schedules Driver Education Theory; the Driver Education team leader schedules the simulator and Behind-The-Wheel.

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6. Students were scheduled for simulator and behind-the-wheel training from their regular physical education classes as well as on Saturdays and during summer recess.

7. The Driver Education grade was not included in the final average for the Physical Education grade. However, the time spent in Simulation/Behind-The-Wheel was counted toward the final credits given in Physical Education (1.25 credits) for six weeks of Driver Education.

8. The students received a grade for the behind-the-wheel instruction, which was a six week program. However, a student's grade for that instruction would be affected, as set forth in the Assistant Superintendent's grading directive (attached as Exhibit I). The purpose of this directive was to insure that students who completed the behind-the-wheel instruction would participate in their physical education classes for the remaining portion of the marking period.

9. The Board abolished the driver education program effective June 30, 1985.

10 The Board placed the three former driver education teachers, to wit, Kenneth Bjornsen, Jack Hohnstine and Gary Reiter, on the health and physical education seniority list.

11. The placement of the three former driver education teachers on the health and physical education seniority list resulted in the termination of three teachers who hold a health and physical education endorsement, to wit, Robert Zeringo, Toni-Ann Murphy and Pauline Pinkos. The aforenamed were certified health and physical education teachers and Robert Zeringo possesses a driver education endorsement. Robert Zeringo, Toni-Ann Murphy and Pauline Pinkos only taught health and physical education.

12. As of June 30, 1985, the position on the health/physical education seniority list of each of the six teachers is as follows:*

NAME	LEVEL	YEARS	MONTHS	DAYS
BJORNSEN	(Secondary)	13	0	0
HOHNSTINE	(Secondary)	13	0	0

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NAME	LEVEL	YEARS	MONTHS	DAYS
REITER	(Secondary)	13	0	0
MURPHY	(Elementary)	9	1	12
	(Secondary)	2	1	19
ZERINGO	(Elementary)	9	0	0
	(Secondary)	9	0	0
PINKOS	(Elementary)	7	6	0
	(Secondary)	3	0	0

*The accuracy of this seniority listing is the subject of the dispute in this matter.

13. ***Robert Zeringo was employed from September 1, 1985, to October 14, 1985, as a 6/10th time special education teacher. On October 15, 1985, he was employed as a full-time special education teacher.

14. Toni-Ann Murphy was employed from September 1, 1985, to January 1, 1986, as a 3/5th time in-school suspension teacher. On January 2, 1986, she was assigned as a full-time in-school suspension teacher.

15. Pauline Pinkos was offered a 2/5th time position as in-school suspension teacher commencing January 2, 1986, which she declined. She is presently a substitute teacher in the State of Maine.

16. Petitioners Robert Zeringo, Toni-Ann Murphy and Pauline Pinkos reserve their rights to assert claims for positions allegedly assigned by the Board of Education to persons of less seniority.

(Joint Stipulation of Facts, pp. 1-5)

POSITION OF PARTIES

The briefs submitted on behalf of Petitioners Pinkos, Murphy and Zeringo argue that, under the amended regulations in effect at the time of the reduction in force, N.J.A.C. 6:3-1.10(1)15, they have acquired seniority in the secondary category as health/physical education teachers while Petitioners Bjornsen, Hohnstine, and Reiter have not; therefore, they are entitled to the contested positions herein. It is acknowledged that a different result may have been reached under the prior seniority regulations but it is contended that the current regulations are controlling, regulations which state that seniority accrues only under such endorsements as actually served. Camilli v. Board of

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Education of Northern Highlands Regional School District, decided by the Commissioner January 3, 1985, aff'd State Board May 1, 1985, Bartz v. Board of Education of Green Brook, decided by the Commissioner May 24, 1985, aff'd State Board November 6, 1985 and Hudson County Area Voc-Tech Association and Jennie Terlizzi v. Board of Education of Hudson County Voc-Tech, decided by the Commissioner January 27, 1986 are cited as support for the propositions that:

1. Seniority is acquired under the specific endorsement served;

2. Seniority accrues in all subjects that authorizes one to teach.

Pinkos argues that an examination of the endorsements at issue precludes any notion that they are interchangeable or related. Much in the same vein, Murphy and Zeringo contend that under N.J.A.C. 6:11-1 et seq. it is clear that the areas each petitioner taught required specific endorsements, i.e., driver education is an endorsement separate and distinct from health/ physical education, neither of which authorizes the individual to teach the other.

Petitioners Bjornsen, Hohnstine and Reiter and the Board argue that to resolve the dispute in this matter, one must look to the statutory framework, N.J.S.A. 18A:35-5 through 8, which mandates the provision of physical education, health and safety courses to be taught in New Jersey public schools for it was within that framework that the Board conducted its driver education program for 13 years. Driver education theory was required of all 10th grade students, being an integral part of the health/physical education curriculum for 10th grade, and all eligible students could elect to take driver simulation/behind-the-wheel courses which counted toward the final credits given for physical education. They cite Parsippany-Troy Hills Education Association v. Parsippany-Troy Hills Board of Education, 1981 S.L.D. 797, aff'd State Board 818, aff'd 188 N.J. Super. 161 (App. Div. 1983), cert. den. 94 N.J. 527 (1983) in support of a board's action to integrate driver education into a district's health/physical education curriculum. Also cited by the Bjornsen petitioners is Werner-Chamberlin v. Board of Education of Warren County Voc-Tech, decided July 11, 1983, which held that, where there is total integration of segments of a course into one curriculum, a board does not violate the tenure rights of the teacher not certified to teach the entire curriculum.

The Bjornsen petitioners further argue that a health/ physical education endorsement subsumes within it the driver education endorsement, contending that the endorsement requires no additional training. They cite a State Board decision which interpreted the prior seniority regulations in support of its position, Ellis v. Middlesex County Vocational School District, decided by the Commissioner May 18, 1983, aff'd State Board May 4, 1984, which states:

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> Petitioner's valid teaching certificate was the Teacher of Health Education Certificate. Thus, when Petitioner commenced employment with the Board in September 1972 as a Teacher of Driver Education, he was actualy (sic) employed under his Teacher of Health Education Certificate, which included an endorsement for Teacher of Driver Education. (Slip Opinion, at p. 2)

Petitioners Murphy, Zeringo and Pinkos counter the above legal arguments through reliance upon the language of the amended regulations for seniority which limits seniority to those categories within which one has served. Also cited is Greiner v. Board of Education of Shamong, decided by the Commissioner April 7, 1983, aff'd State Board September 5, 1984 and Miller v. Board of Education of Mendham, decided by the Commissioner May 17, 1982, rev'd on other grounds/rem'd State Board February 1, 1983, decision on remand November 7, 1983 which held that a person who serves under an endorsement which itself requires another endorsement does not acquire seniority in both unless one serves in both.

LEGAL ANALYSIS AND CONCLUSIONS

The focal issue in need of declaratory judgment concerns the seniority entitlement of certain teaching staff members in the Edison School District to teach health/physical education courses in the secondary category. More specifically, what needs to be answered is whether or not the Board acted properly in assigning Petitioners Bjornsen, Hohnstine and Reiter to teach such courses for 1985-86. To reach a determination, it is necessary to establish the seniority entitlement of these three teachers.

It is undisputed that Bjornsen, Hohnstine and Reiter have each accrued 13 years seniority in the secondary category. What remains to be determined is to which subject area endorsement(s) that seniority attaches. N.J.A.C. 6:3-1.10(1)15, the controlling regulation, reads in pertinent part:

> ***i. Any person holding an instructional certificate with subject area endorsements shall have seniority within the secondary category only in such subject area endorsement(s) under which he or she has actually served.***
>
> ***
>
> iii. Any person employed at the secondary level in a position requiring an educational services certificate or a special subject field endorsement shall acquire seniority only in the secondary category and only for the period of actual service under such educational services certificate or special subject field endorsement. (emphasis supplied)

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It is clearly and unambiguously established in regulation that seniority accrues only in those endorsement areas under which one actually serves. Further, seniority entitlement extends to all subjects within the endorsement(s) served. Camilli, supra; Hudson Co. Area Voc-Tech Association et al., supra It is undisputed that the Bjornsen petitioners taught driver education courses exclusively. In order to teach driver education, be it classroom driver education theory, behind-the-wheel, or simulation driving training, one must possess a driver education endorsement. That such endorsement is the only one which authorizes an individual to teach driver education has been verified with Dr. Celeste Rorro, Director of Teacher Certification, State Department of Education. Endorsements in health, physical education, or health and physical education do not authorize one to teach driver education (N.J.A.C. 6:11-6.2), nor are such endorsements a prerequisite for obtaining a driver education endorsement. (N.J.A.C. 6:11-6.3(b)2)

Consequently, it is determined that Petitioners Bjornsen, Hohnstine and Reiter accrued 13 years seniority in the secondary category under the driver education endorsement which they served. No seniority accrued under their health/physical education endorsements; therefore, any seniority entitlement to a position within the health/physical education department is limited to subject matter authorized to be taught under the driver education endorsement.

The fact that the driver education program/courses are totally integrated into the health and physical education curriculum has no bearing whatsoever on the matter. There is certainly nothing to preclude a board of education from so integrating driver education. Parsippany-Troy Hills, supra Nonetheless, such integration does not alter in the least the determination as to where one's seniority accrues, namely, driver education, not health/physical education. It is by virtue of a driver education endorsement that one is authorized to teach any driver education course, not by virtue of a health and/or physical education endorsement.

To explain further, a driver education endorsement may be obtained by any holder of a valid New Jersey instructional certificate who fulfills the other specified requirements. Thus, a teacher with an instructional certificate endorsed in health/physical education, social studies, Russian or any other subject area endorsement who acquires a driver education endorsement would be authorized to teach driver education courses irrespective of where in the district's curriculum the courses were placed. Under the current regulations, seniority for such service would accrue solely under the driver education endorsement, whereas under the prior regulations, seniority would have accrued in all areas of endorsements as was determined in Ellis, supra. However, the current regulations control in this matter, not the prior ones; thus, Ellis is inapposite.

Had the Bjornsen petitioners taught any health or physical education course under their other endorsements, seniority would

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then have accrued in those areas as well. However, such is not the case herein. (Joint Stipulation of Facts, No. 2)

Accordingly, it is determined that the Board erred in granting seniority credit to Petitioners Bjornsen, Hohnstine, and Reiter in the areas of health and physical education rather than in driver education. The Board is thus ordered to recast its seniority determinations and preferred eligibility lists in accordance with this decision.

Further, the Board erred in assigning the Bjornsen petitioners to any position within the health and physical education area that their seniority did not entitle them to teach. There is insufficient information in the record to ascertain precisely if the driver education theory courses remained as part of the 10th grade health and physical education curriculum when the "driver education program" was abolished effective June 30, 1984. (Joint Stipulation of Facts, No. 9) Likewise, there is insufficient information to ascertain whether or not any of the Bjornsen petitioners would have had seniority entitlement to remain in the Board's employ if the theory courses were retained.

Consequently, the Board is ordered to reconsider and correct, if warranted, its reduction in force determinations in light of this decision. Moreover, the Board is to make whole Petitioners Murphy, Zeringo and/or Pinkos, less mitigation, if it is determined that any were impermissibly removed from his or her health and physical education position as a result of the Board's erroneous seniority determinations with respect to Petitioners Bjornsen, Hohnstine and Reiter.

COMMISSIONER OF EDUCATION

June 2, 1986

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IN THE MATTER OF THE SENIORITY	:	
RIGHTS OF CERTAIN TEACHING STAFF	:	STATE BOARD OF EDUCATION
MEMBERS EMPLOYED BY THE EDISON	:	DECISION
TOWNSHIP BOARD OF EDUCATION.	:	
	:	

Decided by the Commissioner of Education, June 2, 1986

For the Petitioners-Appellants, Klausner and Hunter
(Stephen E. Klausner, Esq., of Counsel)

For the Respondent-Cross-Appellant, R. Joseph Ferenczi, Esq.

For the Petitioneers-Respondents Robert Leringo and
Tony Ann Murphy, Ruhlman, Butrym and Friedman
(Richard Friedman, Esq., of Counsel)

For the Petitioner-Respondent Pauline Pinkos, Zazzali,
Zazzali and Kroll (Kenneth Nowak, Esq., of Counsel)

After carefully reviewing this case, the State Board finds that although it agrees with the conclusions of the Commissioner of Education, his inclusion of information obtained from the Director of Teacher Certification, State Department of Education, into the record was not appropriate under the provisions of N.J.A.C. 1:1-15.3(b), and therefore, was improper under the provisions of N.J.A.C. 6:24-1.13. We further find, however, that such information merely buttressed the Commissioner's conclusions, which were properly based upon applicable regulations. Accordingly, the State Board of Education affirms the decision of the Commissioner for the reasons expressed therein that were based upon the applicable regulations.

December 3, 1986

Affirmed N.J. Superior Court December 14, 1987

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NO. EDU 7290-85

AGENCY DKT. NO. 356-10/85

ALFRED ARENA,
Petitioner
v.
WESTWOOD BOARD OF EDUCATION,
Respondent
and
MATTHEW J. TRAIGER,
Intervenor

Robert M. Schwartz, Esq., for petitioner

Mark Sullivan, Esq., for respondent
(Sullivan and Sullivan, attorneys)

Wayne J. Oppito, Esq., for intervenor

Record Closed: April 7, 1986 Decided: April 22, 1986

BEFORE WARD R. YOUNG, ALJ:

Petitioner, a tenured assistant high school vice-principal currently on a preferred eligibility list and employed elsewhere, alleged the Westwood Board of Education (Board) violated his seniority right and violated N.J.S.A. 18A:28-12 when it failed to notice him of a vacancy in the position of high school principal and proceeded to employ non-tenured Matthew J. Traiger for the position.

The Board denied any impropriety and seeks dismissal due to petitioner's alleged violation of N.J.A.C. 6:24-1.2 or laches.

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The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on November 12, 1985. A prehearing conference was held on January 3, 1986 and the matter proceeded to a plenary hearing on March 7, 1986. Post-hearing briefs were submitted and the record closed on April 7, 1986, the date established for final submission.

The following facts were stipulated by all parties and are adopted herein as **FINDINGS OF FACT:**

1. Petitioner Arena entered into an agreement with the respondent Board of Education on or about April 28, 1971 to serve in the position of high school vice-principal.

2. Petitioner continued to serve as high school vice-principal until June 30, 1979.

3. On or about April 9, 1979, petitioner was advised that he was to be dismissed from his position as high school vice-principal as a result of a reduction in force caused by a reduction in pupil enrollment, and was placed on a preferred eligibility list.

4. On or about August 8, 1985, petitioner corresponded with the Superintendent of Schools to advise that he planned to exercise his rights under N.J.S.A. 18A:28-5 and N.J.A.C. 6:3-1.10.

5. The respondent Board has not recognized petitioner's seniority to the vice-principalship which became vacant on or about July 1, 1985.

6. The individual employed by respondent Board to serve in the position at issue is non-tenured.

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A review of documents transmitted in the case file by the Commissioner of Education reveals that the Petition of Appeal was filed with Commissioner on October 15, 1985, which I adopt as a **FINDING OF FACT.**

The issue of alleged untimely filing and violation of N.J.A.C. 6:24-1.2 will be addressed first.

Petitioner testified that he became aware of the posting of the vacant position on or about April 18, 1985 as his wife, a teacher in respondent's employ, applied for the position.

The high school principal testified that he and petitioner conversed over the telephone in May 1985 concerning the vacant position and the candidacy of petitioner's wife.

Petitioner further testified and verified the testimony of others and documentary evidence that he did converse with the principal in May 1985; Traiger was appointed to the position in question on June 25, 1985; and that notice of Traiger's appointment was sent to his wife under date of June 26, 1985.

The above uncontroverted facts are adopted herein as **FINDINGS OF FACT.**

N.J.A.C. 6:24-1.2 states:

> To initiate a proceeding before the Commissioner to determine a controversy or dispute arising under the school laws, a petitioner shall file with the Commissioner the original copy of the petition, together with proof of service of a copy thereof on the respondent or respondents. Such petition must be filed within 90 days after receipt of the notice by the petitioner of the order, ruling or other action concerning which the hearing is requested. . . .

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In order for the petition herein to have been timely filed, the receipt of the notice by petitioner, or cause of action, would require said cause to have occurred on or after July 15, 1985. 1985 New Jersey Lawyers Diary and Manual.

Petitioner was aware of the vacancy in the position sought in April 1985; discussed it with the high school principal in May 1985; was aware of the Traiger appointment on June 25, 1985 and notice of same sent to his wife under date of June 26, 1985. All said occurrences were prior to July 15, 1985.

The only occurrences after July 15, 1985 were his notice to the Superintendent under date of August 8, 1985 to exercise his seniority right and the filing of the instant petition on October 15, 1985.

N.J.A.C. 6:24-1.2 clearly identifies a cause of action as the "receipt of the notice by the petitioner," which just as clearly eliminates consideration of the August 8, 1985 date as a cause of action because it was a date of transmittal by the petitioner of a notice to exercise a right.

It is not deemed critical to determine the precise date of the occurrence of the cause of action herein, as all possible dates preceded July 15, 1985. I **FIND**, however, the cause of action to have occurred no later than June 26, 1985, and further **FIND** the filing of the Petition of Appeal on October 15, 1985 to be untimely pursuant to N.J.A.C. 6:24-1.2.

The filing of timely appeals has been addressed by the Commissioner, the State Board of Education, and the Courts on numerous occasions, and it is now well established that relaxation of the requirements of N.J.A.C. 6:24-1.2 pursuant to N.J.A.C. 6:24-1.19 is to be sparingly exercised. See Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Assn. 79 N.J. 311 (1979); Riely v. Hunterdon Central Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980).

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I CONCLUDE, therefore, that the Petition of Appeal shall be and is hereby DISMISSED.

Although a finding would be made that the position sought by petitioner is not one to which he is entitled as it is distinctly different from the position for which he is placed on the preferred eligibility list, I FIND no compelling reason to address it in detail in light of the FINDING and CONCLUSION herein.

This recommended decision may be affirmed, modified or rejected by the COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE this Initial Decision with Saul Cooperman for consideration.

22 April 1986
DATE

WARD R. YOUNG, ALJ

APR 24 1986
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:
APR 25 1986
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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ALFRED ARENA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH WESTWOOD REGIONAL SCHOOL DISTRICT, BERGEN COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
MATTHEW J. TRAIGER,	:	
INTERVENOR.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were filed by petitioner within the time prescribed by N.J.A.C. 1:1-16.4a and b. The Board's reply exceptions were untimely submitted.

Petitioner excepts to the ALJ's deciding of this matter on procedural grounds. More specifically, he contends that the ALJ erroneously applied the 90-day limitation to this matter because his claim rests on statutory tenure entitlement, a factor which he believes distinguishes it from Bernards Twp., supra, and Riely, supra. Further, petitioner asserts that

> ***[T]here are no cases which support the finding that a statutory claim such as here is bound by the 90 day limitation. The only limitation that can be placed on such claims is that the monetary relief requested should be prospective only.***
> (Petitioner's Exceptions, at pp. 2-3)

Petitioner also excepts to the ALJ's conclusion that the disputed position is different from that in which he has seniority, contending that there are presently two high school vice principals, both of whom have less seniority than he.

Upon review of the record in this matter, the Commissioner concurs with the determination of the ALJ that the Petition of Appeal was untimely filed pursuant to N.J.A.C. 6:24-1.2. He therefore adopts the initial decision as the final decision in this matter for the reasons stated therein.

Contrary to petitioner's contention, there is case law which specifically addresses the applicability of the 90-day filing requirement to statutory tenure/seniority claims. The State Board

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has specifically addressed the issue in Polaha v. Bd. of Ed. of Buena Regional, decided by the Commissioner December 17,1984, rev'd State Board October 16, 1985 and Paul Gordon v. Bd. of Ed. of Passaic Twp., decided by the Commissioner October 31, 1983, aff'd in part/rev'd in part State Board March 6, 1985. Further, a recent Superior Court, Appellate Division decision has examined the issue, holding that, in fact, the 90-day limit does apply. Joyce Weir v. Bd. of Ed. of Northern Valley Regional High School District, decided by the Commissioner July 20, 1984, aff'd State Board March 6, 1985, aff'd New Jersey Superior Court, Appellate Division, A-3502-84T6 April 9, 1986. Each of these cases has determined that the 90-day limit has application to seniority claims of tenured teaching staff members.

Having determined that petitioner failed to meet the 90-day time limit of N.J.A.C. 6:24-1.2, there is no need to reach a determination on whether or not the disputed position herein was different from the one previously held by petitioner. There is an error in need of correction in the initial decision, ante, however, which states the disputed position was that of a principal, rather than that of a vice principal.

Accordingly, the Petition of Appeal is hereby dismissed with prejudice.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 4235-85 and
EDU 5479-85
AGENCY DKT. NOS. 142-5/85 and
275-8/85
(CONSOLIDATED)

IRENE BARTZ,
Petitioner,
v.
GREEN BROOK BOARD OF EDUCATION,
Respondent,
and
MARILYN BURKE,
Petitioner,
v.
GREEN BROOK BOARD OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner Irene Bartz (Ruhlman, Butrym and Friedman, attorneys)

Linda K. Stern, Esq., for petitioner Marilyn Burke (Sterns, Herbert & Weinroth, attorneys)

Kenneth S. Meyers, Esq., for respondent (Nichols, Thomson, Peek & Meyers, attorneys)

Ezra D. Rosenberg, Esq., for intervenor Brian Reardon (Katzenbach, Gildea & Rudner, attorneys)

Record Closed: March 17, 1986 Decided: May 1, 1986

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BEFORE **BRUCE R. CAMPBELL**, ALJ:

Irene Bartz (Bartz) filed a petition before the Commissioner of Education charging the Green Brook Township Board of Education (Board) violated her seniority rights when it abolished her full-time home economics teaching position and created two part-time positions effective September 1985. Marilyn Burke (Burke) then filed a petition claiming the Board's action to reduce her full-time home economics position to a part-time position, while assigning a part-time schedule of home economics classes to a teacher with less seniority in a subject area for which Burke is certified, violated her seniority rights. The matters were transmitted to the Office of Administrative Law on July 10 and August 29, 1985, respectively. A prehearing conference was held by telephone on August 16, 1985. On September 11, 1985, I consolidated the cases.

Brian Reardon (Reardon) a Green Brook teaching staff member, moved to intervene. On October 2, 1985, I determined that Reardon has sufficient interest in the outcome of this case and recognized him as an intervenor.

On November 27, Burke filed an amended petition of appeal. Other conferences of counsel followed and a schedule of submissions was set, the parties agreeing that no material facts are in issue. The parties submitted a joint stipulation of facts on February 19, 1986. All submissions were timely made thereafter and the record closed on March 17, 1986.

STIPULATED FACTS

The attorneys for the respective parties stipulate as follows:

1. The employment record with the Board of Education of the Township of Green Brook for the petitioners and the intervenor are as follows:

BARTZ

School Years	Courses Taught
1971-72	Cooperative Industrial Education, 2 business classes (sales)
1972-73	Cooperative Industrial Education Only

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1973-74	Cooperative Industrial Education Only
1974-75	Cooperative Industrial Education Only
1975-76	Cooperative Industrial Education Only
1976-77	Cooperative Industrial Education, 1 business class (Distributive Education)
1977-78	Cooperative Industrial Education, 1 Home Economics class
1978-79	Cooperative Industrial Education, 1 Home Economics class
1979-80	Cooperative Industrial Education, 1 Home Economics class
1980-81	Cooperative Industrial Education, 1 Home Economics class
1981-82	Cooperative Industrial Education, 1 Home Economics class
1982-83	Cooperative industrial Education, 2 vocation classes, 1 Home Economics class
1983-84	Cooperative Industrial Education 2 1/2 Home Economics classes
1984-85	3 Home Economics classes
Sept. 1, 1985 - Oct. 31, 1985	4 Home Economics classes

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BURKE

1978 to present	7 years full time, Home Economics current year part time (4/7ths) Home Economics

REARDON

1982 to present	Family Life: full time

2. Petitioner Bartz resigned from the Green Brook School District effective October 31, 1985 to accept a full-time position in the State of Pennsylvania. The resignation was accepted by the Board of Education which waived the sixty (60) day notice requirements.

3. The Board of Education hired Deborah N. Walter to fill the part-time position (4/7ths) in Home Economics vacated by Mrs. Bartz.

4. Petitioner Burke (employed in a 4/7ths position for the 1985-86 school year) applied for the 4/7ths position vacated by Petitioner Bartz and was not hired for the additional part-time position.

5. The respondent Board created and continues to maintain two equal part-time (4/7ths) positions in Home Economics.

6. Upon the recommendation of the High School Principal, the Board did not consolidate two part-time positions into a full-time position.

7. Certificates of all employees affected are as follows:

Reardon	-	Teacher of Social Studies
Reardon	-	Teacher of Driver Education
Reardon	-	Teacher of Health and Physical Education
Bartz	-	Teacher of Art
Bartz	-	Teacher of Home Economics
Bartz	-	Coordinator, Cooperative Industrial Education

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Bartz - Teacher of Distributive Occupations
Burke - Teacher of Home Economics
Walter - Teacher of Home Economics

8. Curricula of Family Life and Home Economics on file in the Office of Administrative Law under Bartz v. Green Brook (Docket No. EDU 4214-84).

9. Distributive Occupations course not offered by Green Brook School District for 1984-85 or 1985-86 school years.

10. Cooperative Industrial Education course not offered by Green Brook School District for 1984-85 or 1985-86 school years.

11. As part of the Home Economics Department, Petitioner Burke taught one class of Interpersonal Relations during the 1978-79, 1980-81 and 1981-82 school years and Child Care and Development during the 1978-79 (2 classes), 1980-81 (3 classes), 1981-82 (1 class) and 1984-85 (1 class) school years.

12. The position as Family Life instructor was posted prior to the commencement of the courses in September 1982. Petitioner Burke did not apply for the position at that time.

These stipulations are adopted as **FACTS** for the purposes of this case. Appended to the stipulations are a position posting, Home Economics Teacher, October 22, 1985; a letter from Burke to the high school principal, October 29, 1985, and reply, principal to Burke, October 30, 1985.

DISCUSSION AND DETERMINATION

For the reasons set forth below, I **CONCLUDE** that Petitioner Bartz was entitled to a full-time Home Economics position until at least October 31, 1985; that Petitioner Burke had no claim to the Family Living teaching position but, as of November 1, 1985, was entitled to a full-time Home Economics position if Bartz chose to work outside the district, and that Intervenor Reardon is properly employed in the Family Living position.

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In Bartz v. Green Brook Bd. of Ed., OAL DKT. EDU 4214-84 (Apr. 8, 1985), adopted Comm'r of Ed. (May 24, 1985), aff'd St. Bd. (Nov. 6, 1985) (Bartz I), the Administrative Law Judge and the Commissioner determined that Bartz was entitled to a full-time position as Home Economics teacher when her full-time Cooperative Industrial Education position was abolished. The stipulated facts here show Petitioner Bartz with eight years' seniority in Home Economics and Petitioner Burke with seven years' seniority in Home Economics at the beginning of the 1985-86 school year. N.J.A.C. 6:3-1.10 makes no distinction between part-time and full-time employment for the purpose of calculating seniority. Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362, 368 (1983).

Where it would cause no disruption of the educational program, a Board must assign the more senior of two teachers to the equivalent of a full-time position in a category when full-time positions in the category are abolished. Miles v. Watchung Bd. of Ed., (N.J. App. Div., Dec. 5, 1985, A-1903-84T7) (unreported); Valinski v. Garwood Bd. of Ed., OAL DKT. EDU 5930-84 (Jan. 22, 1985), rev'd Comm'r of Ed. (Mar. 11, 1985), rev'd St. Bd. (Nov. 13, 1985). The principal, upon being deposed, said it would present no difficulty to assign Bartz a full-time Home Economics teaching load (Transcript, pp. 22-23).

This is a different situation from that presented in Klinger v. Cranbury Tp. Bd. of Ed., 190 N.J. Super. 354 (App. Div. 1982). In Klinger, the board "had chosen dual instruction in its physical education program for years." Id. at 358. The teachers involved taught the same physical education classes at the same time. In this case there is no such educational basis under the Board's decision to abolish full-time home economics positions. I **FIND** that Bartz was entitled to a full-time position teaching Home Economics from September 1, 1985.

Under the holding in Mishkin v. Mountainside Bd. of Ed., OAL DKT. EDU 1262-81 (Jan. 19, 1983), rev'd Comm'r of Ed. (March 4, 1983), aff'd St. Bd. (Sep. 7, 1983), rev'd App. Div. (N.J. App. Div., Nov. 2, 1984, A-803-83T2) (unreported), a teaching staff member who resigns a part-time position but is on a preferred eligible list for the full-time analog of that position does not relinquish her statutory entitlement to the full-time position. The Appellate Court said:

> We reject, however, the State Board's conclusion that Mishkin's tenure and seniority rights to a full-time position were "effectively terminated upon the acceptance of her resignation by the Board."

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> In her December 21, 1979 "resignation" letter Mishkin specifically affirmed that "I am prepared to work on a full-time basis." Had she refused the part-time position when it was first created, she would have remained "upon a preferred eligible list in the order of seniority for reemployment." N.J.S.A. 18A:28-12; Boguszewski v. Demarest Board of Education, 1979 S.L.D. 232. We find neither reason nor authority to regard her "resignation" letter as a relinquishment of those statutory rights.
>
> The dismissal of Mishkin's claim to employment in a four day per week speech correctionist position is affirmed; but we hold, contrary to the decision of the State Board, that Mishkin retains the rights afforded by N.J.S.A. 18A:28-12 with respect to any full-time speech correctionist position, if any such position should be reestablished by the Board. (Slip op. at p. 3).

Obviously, the Board has not reestablished the full-time Home Economics position. But it has been found that the Board had a duty to maintain a full-time position in Home Economics for the 1985-86 school year. Therefore, the Board must pay to Bartz the difference between what she earned from November 1, 1985 to the date of final decision in this matter (or the end of the 1985-86 school year, whichever occurs first) and what she would have earned had she been employed by the Board as a full-time Home Economics teacher for the same period. The Board also must offer Bartz a full-time Home Economics position.

A point made in Boguszewski, above, must be addressed. In reaching a conclusion contrary to that in Mishkin, the hearing examiner was concerned that a teaching staff member in these circumstances would be allowed "to forever opt between his alleged tenure entitlement and a more lucrative position, returning to his old position only when all other job opportunities have been exhausted." 1979 S.L.D. at 235. The short answer to that concern is that the staff member has one and only one opportunity to exercise the right when a full-time position is restored, whether by board action or, as here, by order. If taken, there is no question. If refused, the staff member has waived the N.J.S.A. 18A:28-12 right.

Burke is the less senior of the tenured Home Economics teachers involved. If any reduction is made in Home Economics offerings, it must affect nontenured persons and then tenured persons in the order inverse to their seniority in the category. From the information supplied in the stipulations, Walter, then Burke and then Bartz would be reached in any such action. I **FIND** if Bartz exercises her statutory right and demands a full-time Home Economics position, Walter must be RIFed or reassigned and Burke must be offered the remaining part-time Home Economics position.

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I further **FIND** that Burke has no claim to the Family Living position. In Hart v. Ridgefield Bd. of Ed., OAL DKT. EDU 5113-84 (Apr. 10, 1985), adopted Comm't of Ed. (June 7, 1985), the Commissioner decided virtually the same question. In Hart, the petitioner was a full-time, tenured Home Economics teacher. She was reduced to a 2/5 time position as part of a RIF. Before Ridgefield formally implemented its Family Life program, Hart had taught aspects of the program in her Home Economics classes. On this basis Hart claimed a right to the Family Life position. The Commissioner disagreed and dismissed the petition.

The Commissioner, referring to Johnson v. Glen Rock Bd. of Ed., OAL DKT. EDU 6359-83 (Apr. 2, 1984), adopted Comm't of Ed. (May 21, 1984), stated:

> Notwithstanding a number of distinguishable factual circumstances between Johnson and the matter herein, the Commissioner reiterates his determination in regard to family life teaching assignments and seniority articulated in Johnson. That determination rejected the argument that a board of education is legally obligated to implement its family life curriculum in such a manner as to accommodate a seniority claim. Id. at 13.
>
> . . .
>
> N.J.A.C. 6:29-7.1 authorizes individuals with different types of endorsements to teach in a district's family life education program. The intent of the State Board in so acting was to allow local boards flexibility in implementing their family life program and to permit an interdisciplinary approach to such programming. The regulation is clear and unambiguous that a diversity of individuals may teach family life education. A board of education is under no obligation to assign family life instruction to staff members with any one type of endorsement; nor must the implementation of its program be controlled by seniority claims.
>
> If seniority claims were controlling for family life assignments, a severe constraint would result in a board's designation of which discipline it deems appropriate to teach specific portions of its family life curriculum. It could also create a burdensome strain in the scheduling of instruction not for only pupils but teachers as well. The Commissioner firmly believes that acceptance of petitioner's arguments to the contrary would lead to results far beyond the contemplation of the Legislature and State Board and it would be to the detriment of both the orderly administration of the public schools of this State and the effective implemention of family life education.

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> A board of education must be accorded a presumption of correctness in assigning a particular discipline(s) to teach various portions of its family life education program. The Commissioner will not overturn a board's action unless (1) such assignment is not deemed to be based on educational reasons; (2) it was done in bad faith; or (3) it contravenes the family life educations regulations. [emphasis added]. Id. at 13-14.

In summary, I **FIND**, in addition to the facts previously adopted and for the reasons expressed:

1. Bartz was and is entitled to a full-time Home Economics position in the 1985-86 school year;

2. Burke is not entitled to a full-time position under the present schedule of offerings in Home Economics, but may assert seniority over Walter as to the remaining, part-time Home Economics position;

3. Burke has no claim to the Family Life teaching position.

I **CONCLUDE** that the Board must offer the full-time Home Economics position to Bartz, retroactive to September 1, 1985, and must pay to her the difference between what she has earned since September 1, 1985 and what she would have earned had she been employed in the full-time Home Economics position since September 1, 1985. The Board must adjust other emoluments, including Bartz's Teachers Pension and Annuity Fund account, accordingly. I further **CONCLUDE** that if Bartz refuses the offer of full-time employment, she will have waived her statutory right established by N.J.S.A. 18A:28-12. It is so **ORDERED.**

I **CONCLUDE** that Burke, being less senior in the category than Bartz, has no claim to the full-time position but may assert priority over all other teaching staff members to the remaining part-time Home Economics position. I further **CONCLUDE** that Burke has no claim to the Family Life position. Thus, Reardon is undisturbed. It is so **ORDERED.**

Various parties have raised other points but because the case law controlling this matter is so clear, it is not necessary to address them.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

1 MAY 1986
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAY 6 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

bc/ee

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EXHIBIT LIST

Deposition of Joseph Polilli, December 19, 1985

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IRENE BARTZ,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	DECISION
RESPONDENT.	:	
MARILYN BURKE,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF GREEN BROOK, SOMERSET COUNTY,	:	
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Exceptions were received from the parties within the time prescribed by N.J.A.C. 1:1-16.4a, b and c.

The Board and Petitioner Burke allege that the ALJ erroneously concluded that Petitioner Bartz had eight years seniority as a home economics teacher. Their arguments center around the applicability of Lichtman, supra, to the case such that pro rata calculation is required for Bartz's service. The Commissioner finds the arguments entirely without merit. Bartz's seniority entitlement for service under her home economics endorsement was already fully addressed (including the Lichtman argument) by the Commissioner and the State Board in Bartz (1985), supra. The ALJ's seniority determination herein is consistent with that prior seniority calculation by the Commissioner and the State Board.

The next exception to be addressed is the Board's objection to the ALJ's determination that it impermissibly created two part-time positions in home economics. It asserts, inter alia, that (1) the ALJ did not properly consider the many educational reasons in support of its action; (2) he placed too much emphasis on the testimony of the principal; (3) he shifted the burden of proof from petitioner to the Board when requiring it to prove the soundness of its reasoning; and (4) he misinterpreted the holdings in Miles, supra, Valinski, supra, and Klinger, supra. Of this, the Board contends that "***tenure and seniority rights of an incumbent

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full-time teacher cannot prevail against the authority of a Board when exercised in good faith and with some rational basis.***" (Board's Exceptions, at p. 3)

Further, the Board excepts to the ALJ's statement in the initial decision, ante, which reads:

> Where it would cause no disruption of the educational program, a Board must assign the more senior of two teachers to the equivalent of a full-time position in a category when full-time positions in the category are abolished.***

It contends that this statement dilutes the language of the above-cited cases and that Valinski, supra, stands for the proposition that it need only have a sound educational policy for its action.

Upon review of the record and arguments advanced by the Board, the Commissioner is unpersuaded that the ALJ erred in reversing the Board's action to reduce a full-time position and a part-time position to two part-time positions. As expressed by the State Board in Valinski, supra:

> ***[A] board's ability to act pursuant to N.J.S.A. 18A:28-9 is not without limits and, in evaluating the propriety of this Board's action, we must be assured that it has not impermissibly abridged the tenure rights granted by N.J.S.A. 18A:28-5.***. (Slip Opinion, at p. 3)

The State Board specifically addressed the standard of review to be undertaken in cases wherein a tenured teacher's full-time position is reduced to part-time, while a nontenured teacher (or individual with less seniority) is retained. It stated:

> ***We therefore conclude that when a petitioning teacher has established that her position was abolished or reduced while non-tenured [or less senior] teachers in the same position were retained, the board must demonstrate that it has fulfilled its obligation to attempt to acknowledge her tenure rights, and that if it fails to establish the existence of educationally based reasons precluding retention of the tenured [or more senior] teacher, it has acted arbitrarily. We believe that this approach properly accommodates the legislative policies of both N.J.S.A. 18A:28-9 and N.J.S.A. 18A:28-5***. (Id., at pp. 5-6)

In requiring that the Board establish the existence of an educationally sound reason for creating two part-time positions,

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thus reducing the position of a tenured individual, the ALJ did not shift the burden of proof. Rather, he merely applied the standard of review articulated above. Further, the Board's assertion that the ALJ placed too much emphasis on the testimony of the principal is entirely without merit. It was stipulated that the Board's decision to create two part-time positions was based on the principal's recommendation (Stipulation #6), the only witness deposed in lieu of a formal hearing was the principal (see letter of February 7, 1986 from Board Attorney to ALJ), and that deposition clearly states that the superintendent "just relied upon the principal's recommendation." (Tr. 4).

A careful examination of the record leads the Commissioner to conclude that, unlike the board in Klinger, supra, the Board herein has not established the existence of any educationally based reasons precluding Petitioner Bartz's retention on a full-time basis. Miles, supra; Valinski, supra Thus, the Board has failed to fulfill its obligation to attempt to acknowledge her tenure rights to a full-time home economics position, rights which were clearly established in Bartz, supra. Consequently, the Commissioner affirms the ALJ's determination that Bartz was entitled to a full-time home economics position and he rejects the Board's argument that he misinterpreted the above-cited cases.

In addition to excepting on the basis of Lichtman, supra, to the ALJ's determination that Bartz had seniority entitlement to the full-time position the Board impermissibly abolished, Petitioner Burke argues in her exceptions that Bartz's resignation from her employment with Green Brook terminated her tenure and seniority rights. Thus, she alleges, the ALJ erred in ruling otherwise. The Commissioner determines that the ALJ correctly relied on and applied Mishkin, supra. Absent documentation to the record that Bartz's resignation was for anything but her then held part-time position, Mishkin is controlling. Likewise, the Commissioner finds nothing in Burke's exceptions to persuade him that the ALJ erred in determining that Burke had no seniority entitlement to Intervenor Reardon's family life position. The ALJ's analysis of relevant case law addressing family life claims is correct.

Finally, Petitioner Burke alleges that while the ALJ apparently recognized that the Board violated her tenure rights by maintaining two part-time home economics positions and refused to place her in a full-time position after Bartz resigned, he erred in failing to grant her any relief. As such, she seeks compensation for any differential between her current part-time status and that which she would have received as a full-time teacher after Bartz's resignation. She contends that, assuming the judge was correct in ruling Bartz's rights were violated, the impact on her rights cannot be ignored.

In the initial decision, ante, the ALJ concluded that

> Petitioner Bartz was entitled to a full-time Home Economics position until at least October 31, 1985; that Petitioner Burke had no claim to the

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> Family Living teaching position but, as of November 1, 1985, was entitled to a full-time Home Economics position if Bartz chose to work outside the district***.

Later, however, the ALJ determines on pages 6, 7, and 9 of the initial decision that Bartz was entitled to the full-time position for the 1985-86 school year as of September 1, 1985, not just until October 31, 1985, a determination with which the Commissioner agrees since she was not determined to have waived her tenure and seniority rights by resigning her part-time position. Further, the ALJ concludes that Petitioner Burke is not entitled to the full-time position when stating in the initial decision, ante, that

> ***Burke, being less senior in the category than Bartz, has no claim to the full-time position but may assert priority over all other teaching staff members to the remaining part-time Home Economics position.

Had it been determined that Bartz's resignation constituted a waiver of her tenure and seniority rights, then Burke would have been entitled to the full-time position as of November 1, 1985, but such was not the case. As previously stated, the ALJ's determination that resignation from a part-time position does not signify a waiver of one's seniority entitlement to a full-time position is correct. Mishkin, supra Thus, Burke is not entitled to the relief sought. Should Bartz, however, decline/refuse the full-time employment ordered in this decision, Burke is entitled to the full-time position since Bartz will be deemed to have waived her rights pursuant to N.J.S.A. 18A:28-12.

Accordingly, the initial decision rendered by the Office of Administrative Law is adopted by the Commissioner as the final decision in this matter for the reasons expressed therein. Therefore, the Board is to comply with the directives ordered by the ALJ. An error is noted in the initial decision, ante, with respect to the date from which Bartz is entitled to differential back pay. The date is correctly noted to be September 1, 1985, not November 1, 1985.

COMMISSIONER OF EDUCATION

June 11, 1986

Pending State Board

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6737-85
AGENCY DKT. NO. 344-10/85

JOHN SANDRI,
Petitioner,
v.
BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner

Phillip Scalo, Esq., for respondent (Smith, Don, Alampi & Scalo, attorneys)

Record Closed: March 27, 1986 Decided: April 28, 1986

BEFORE **STEPHEN G. WEISS**, ALJ:

PROCEDURAL HISTORY

In October 1985, John Sandri filed a petition of appeal with the Commissioner of Education alleging that the respondent, his employer, had failed to appoint him to the position of Assistant Director Special Needs/Student Services 9-14, in violation of his tenure and seniority rights. The Board denied the essential allegations of the petition and the matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

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A telephone prehearing conference was conducted by the undersigned administrative law judge on November 21, 1985, and the hearing took place on February 26, 1986 at the Municipal Building, South Hackensack, New Jersey, and written posthearing submissions were filed on March 27, 1986.

JOINT STIPULATION OF FACTS

Prior to commencement of the hearing, counsel jointly agreed to a Stipulation of Facts (Exhibit J-1) which set forth the following matters:

1. Petitioner, John Sandri, began his service in the respondent, Bergen County Vocational School District, in 1968. He began his service as a teacher.

2. Petitioner continued serving as a teacher until the 1972-1973 school term. He was appointed as a Guidance Counsellor for the 1972-1973 school term.

3. On or about September 1, 1977, petitioner was appointed to the position of Principal.

4. Petitioner continued to serve as a Principal until the 1981-1982 school term. In or about September, 1981, petitioner began his service as Supervisor of Guidance. Petitioner served under a Supervisor's certificate.

5. Petitioner's position of Supervisor of Guidance/Shop was abolished effective July 1, 1985.

6. The position of Assistant Director Special Needs/Student Services was approved by the Board of Education on May 13, 1985. The position became effective on July 1, 1985. The position was approved by the County Superintendent's office.

7. The individual assigned to the position of Assistant Director Special Need/Students Services was Joyce Chapin. She serves in an "acting" capacity.

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In addition to the Joint Stipulation, counsel also agreed to the introduction in evidence of two job descriptions which are pertinent to this matter. The first described the duties and responsibilities of "Supervisor - Subject Area," the position held by Sandri during 1984-1985 (Exhibit J-2). The second listed the duties and responsibilities of the position which Sandri now claims, Assistant Director Special Needs/Students Services 9-14 (Exhibit J-3).

TESTIMONY FOR PETITIONER

John Sandri has served as a guidance counsellor in the respondent's school district since July 1, 1985, and presently is assigned to the satellite school in Paramus. He is certified as a teacher of social studies, in student personnel services, and as a principal, a supervisor, and chief school administrator. Prior to the 1985-86 school year, he held the position of Supervisor of Guidance/Shop at Bergen County Vocational-Technical High School (hereinafter "Bergen Tech"), which is located in Hackensack. In that supervisory position he had responsibility over all of the guidance personnel at Bergen Tech. In addition, he also supervised about 25 shop teachers located there.

Sandri addressed the specific performance responsibilities which were set forth on the job description for the position he seeks—Assistant Director Special Needs/Students Services 9-14 (hereinafter "Assistant Director/SNSS"). He maintained that the duties that he performed as a supervisor at Bergen Tech involved many of the same responsibilities which are now performed or to be performed by the Assistant Director/SNSS. He pointed out that he was regularly involved as supervisor in cases concerning exceptional students and in that regard worked with the Child Study Teams, the director of special services and other personnel involved in that process. He also helped coordinate meetings with parents and counsellors and conducted them on his own.

In addition, Sandri said that as a supervisor he made recommendations as to the placement of individual students having special needs and also assumed responsibility for remaining aware of state and county regulations affecting the school health program. He also was directly involved in reviewing or acquiring records of students and had complete

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responsibility for minimum basic skills testing, placement testing for new entrants and administration of the Preliminary Scholastic Aptitude Test (PSAT). Since he was in charge of the guidance department at Bergen Tech, he was also responsible for scoring placement tests and necessarily worked on scheduling of students with other supervisors.

With respect to the promotion of sound mental health practices, Sandri explained that this was a primary area of concern. He instituted a "big brother-big sister" pilot project for new students and also was involved in developing programs in suicide prevention and alcohol and drug abuse. Beyond that, he pointed out that any person who works in the guidance counselling area obviously is expected to furnish leadership in promoting sound mental health practices in all aspects of the school system.

With regard to monitoring student records in order to keep them current and in the collection of data, Sandri pointed out that he carried out these activities too. He prepared many reports respecting enrollment, racial surveys, etc., and was very involved in the collection of statistics needed to plan the educational program.

Sandri noted that in his prior position, he was regularly involved in the process of identifying students in need of special services. The identification, diagnosis, follow-up, and referral of such students was certainly within the scope of his previous job. In addition, as supervisor, he also was responsible for the preparation and administration of a departmental budget, just as the Assistant Director/SNSS is.

Finally, with respect to two particular performance responsibilities which deal with increasing one's professional knowledge and taking on additional tasks and responsibilities, Sandri noted that he certainly carried out those functions.

Accordingly, by virtue of his own analysis of the performance responsibilities set forth on the job description for the Assistant Director/SNSS, Sandri concluded that it substantially describes precisely what he did in his previous position as Supervisor of Guidance/Shop and that the abolition of that position and the creation of the new one surely should have been accompanied by his appointment to the new position by virtue of his seniority.

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On cross-examination, Sandri conceded that in 1985-86, a major organizational change took place in the school district and that several positions were abolished in addition to his own. He also agreed that in his previous assignment as supervisor, he was strictly limited to Bergen Tech and that there are other high school level facilities in the district which did not concern him (Paramus, Teterboro and Norwood). He also agreed that as supervisor he did not supervise Child Study Team personnel and he reported to the principal of Bergen Tech. Moreover, as a supervisor, Sandri was responsible for only two to four guidance counsellors at Bergen Tech, and there were six or seven other guidance counsellors in the district over whom he exercised no such authority.

Sandri also identified a letter he had written to the superintendent of schools in March 1985 which responded to certain statements which had been made at a faculty meeting (Exhibit R-1). In that letter, he agreed that one of his concerns was that the guidance area should be placed on a "district-wide" basis in order to provide a "common focal point" for all persons having anything to do with the guidance area. Finally, Sandri agreed that he was not making any claim that the Board's decision to abolish his position as supervisor and to create the new position of Assistant Director/SNSS was the product of bad faith.

Petitioner's next witness was Ms. Bonnie Marmor, presently Director of Development in the school district. Marmor had been the principal of Bergen Tech from 1979 through 1983-84 and in that capacity was Sandri's superior. She was the one to whom he reported with respect to the guidance department activities.

Marmor reviewed the performance responsibilities set forth on the Assistant Director/SNSS job description and agreed that as the Supervisor of Guidance/Shops, Sandri did function in several of the same areas. For example, he was involved in providing or recommending appropriate special services for exceptional students, he did recommend placements, he did assist in the testing at the high school, he did monitor student records and collect statistical data with regard to the high school, he did keep her advised with respect to students needing attention, and, like other staff members, he remained active in the area of his own professional development. However, Marmor also noted that Sandri

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was not involved with the planning, development or coordination of any district-wide system of health services and did very little with respect to the scheduling of physical examinations. She pointed out, in particular, that in the area of assuming responsibility for the "accuracy, validity and interpretation of results from use of a testing program" (see, Exhibit J-3), this was not Sandri's responsibility at all. Rather, the subject supervisors in the English, mathematics and basic skills areas carried out that function. Further, although Sandri was involved in scheduling of students, his participation did not involve the qualitative process of determining cutoff points. In essence, Sandri's responsibilities were limited to Bergen Tech and were not system-wide. As far as she knew, Sandri had no responsibilities for any of the activities taking place at the satellite facilities. As Supervisor of Guidance/Shop, he was, in her opinion, equivalent to a department head.

Petitioner's final witness was the person who presently holds the position of Assistant Director/SNSS, Ms. Joyce Chapin. She presently is in an "acting" capacity, having been appointed on August 1, 1985. For eight years prior thereto, she was a guidance cousellor in the school district. At present Chapin is not involved in the actual evaluation of any of the guidance counsellors, of whom there are now a total of ten in the school district.

Chapin reviewed and analyzed the performance responsibilities set forth on her job description and explained what she is now doing with respect to each of them. The main thrust of her testimony was that her responsibilities in each of the areas were district-wide in scope, rather than limited to Bergen Tech. Beyond that, her department supervises all of the Child Study Teams in their activities, as well as the adult students. Chapin estimated that at the present time, approximately eighty percent of her work is related to high school matters, although she expected this to decrease in the future. In her estimation, the other personnel in her department spend less than half of their time dealing with the Bergen Tech school population since there are hundreds of special needs students located at other facilities in the district who demand the department's attention.

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Following conclusion of Chapin's testimony, the petitioner rested his case. At that point, respondent moved to dismiss the petition on the ground that Sandri had failed to sustain his burden of proof and respondent was entitled to entry of a decision in its favor as a matter of law. Following argument of counsel, I determined that Sandri had made out a prima facie case, at least sufficient to withstand such a motion, and therefore it was denied. See, Dolson v. Anastasia, 55 N.J. 2 (1969).

TESTIMONY FOR RESPONDENT

The only oral testimony offered by respondent was that of Anthony Miller, presently the Director of Personnel. He has been employed in various capacities in the school district for 15 years.

Miller identified two charts reflecting the school district's organizational structure in 1984-85 (Exhibit R-2), and the present administrative structure (Exhibit R-3). He pointed out that guidance personnel and other such support persons now report directly to the Director of Special Needs/Student Services.

Miller was closely involved in the school district's recent reorganization process, which culminated in the present administrative structure. He had helped frame the organizational charts and develop the job descriptions in consultation with consultants hired by the Board. In addition, he saw to it that unrecognized titles were submitted to the Bergen County superintendent of schools for approval. As Miller put it, the main focus of the reorganization effort was to overcome a major concern of the Board and the administration—undue fragmentation. The Board had received a report from its consultant, a Dr. Joel Bloom, indicating that the district was split into four semi-autonomous entities—the high school, the satellite schools, the adult program, and the special needs program. In order to create cohesiveness in operation and planning, it was recommended that integration of these functions ought to take place. According to Miller, rather than have the building principals report to the Director of Special Needs, it was decided that a staff position should be created with overall responsibility to handle the entire area. Since there was concern about the division of functions, it was determined that a uniform program ought to be implemented, particularly in order to deal with the

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growing problem of an ever increasing number of special education students entering the system. Thus, the new position of Director, Special Needs/Student Services, was created to function on a district-wide basis. Miller noted that the job description for the director (Exhibit R-4) required that person to exercise supervisory responsibility over an assistant director, the Child Study Teams, the guidance counsellors, the cooperative industrial education coordinators, the school nurse, and the financial aid officer.

According to Miller, the health services area is a particular item which distinguishes Sandri's previous position from that now held by Chapin, since this was an area which was never within the scope of the position held by petitioner at Bergen Tech. It is a support service which has been added to the new department as part of the overall scheme of integration. Similarly, with respect to testing, Sandri's previous position was limited to activities at the high school, and it is now the respondent's intention to carry out a district-wide testing program for all special needs students.

The maintenance of student records and collection of data was also an area which Miller said was one of "considerable concern." Although the system maintained at Bergen Tech was a "valid" one, the retention and maintenance of permanent records at satellite facilities was "sketchy." Now, the district requires a centralized method to overcome that problem. So, too, with respect to several of the other areas covered in the new job descriptions—their major thrust, said Miller, is to foster the desired centralization and integration processes so as to eliminate the problems which previously existed due to the functional fragmentation noted by the Board's consultant. In short, the school district is committed in its new organization to a "wider view" of its needs so that prioritization can take place at a level which can deal most effectively with those needs.

On cross-examination, Miller conceded that there are only a very limited number of adults at the high school, which is basically structured on a 9-12 grade level. While he agreed that certain ambiguities might still exist with respect to the precise day-to-day functions of the assistant director, he pointed out that the position is still in a "transition stage" and that the development of the parameters of the position is an ongoing process. Chapin, he said, is holding her position in an "acting" capacity while the administration

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closely reviews the new structure. Nevertheless, he insisted that the district is firmly committed to the elimination of the "segmented" response to student needs on a school-wide rather than a district-wide basis which previously marked the system.

As the author of the two job descriptions in issue, it was Miller's firm opinion that the two positions here in issue are "conceptually totally different," although there naturally are certain common elements. After reviewing each of the performance responsibilities set forth in the new job description and comparing them to the nature of the activities which Sandri exercised in the prior position, Miller concluded they are distinctly different jobs.

DISCUSSION

The petitioner's case rests upon the proposition that the position of Assistant Director/SNSS is "so strikingly similar to the former position of Supervisor of Guidance/Shops held by petitioner that seniority in one should confer seniority in the other" (Brief of Petitioner, p. 3). On the other hand, respondent maintains that the creation of the new position was part of an overall effort to make sure that vital support services are provided on an integrated, district-wide basis, and that the fragmentation of functions previously marking the district's operation is eliminated in favor of a cohesive program. Thus, since petitioner's previous position was tantamount to that of a department head within the high school, and the new position entails district-wide responsibilities of a far-reaching nature, respondent concludes they cannot possibly be considered so substantially identical that Sandri is entitled to claim the new position by virtue of his tenure and/or seniority. Since petitioner does not contend that the Board's action was arbitrary, capricious, unreasonable, or otherwise the product of bad faith, and since there has been no showing of substantial identity between the two positions, the Board concludes that Sandri's petition should be dismissed.

In support of his petition, Sandri places a good deal of reliance on the decision in Waldove v. Bd. of Ed. of East Brunswick, OAL DKT. EDU 6540-84, adopted by the Commissioner May 10, 1985, aff'd State Bd. of Ed., November 6, 1985. In that case, the

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petitioners held positions as department chairmen in one school. When their positions were abolished and new ones created, the new responsibilities encompassed more than one school. The Commissioner determined that despite the inclusion of more than one school building within the scope of the new positions, they really were not different from the prior ones and petitioners were entitled to these new positions.

Accordingly, petitioner contends that although the Assistant Director/SNSS position is a so-called "district-wide," rather than a mere "school-wide" one, the actual performance responsibilities are very much alike and many of the areas listed in the new position are precisely those which Sandri claims he was doing as a supervisor. Beyond that, Sandri points to the fact that by her own admission Chapin is spending approximately 80 percent of her time in activities related essentially to the high school. Thus, Sandri claims that since he is senior to Chapin, he should have been given the job she holds.

According to respondent, the difference between the two positions is distinctly more than mere nomenclature. Pointing to the history of the district's efforts to eliminate perceived problems and to create a coordinated district-wide program, the Board notes that the new organizational structure, of which the Assistant Director/SNSS is an integral part, clearly makes the new position markedly dissimilar to that held by Sandri at Bergen Tech.

In support of its position, respondent relies on the decision in Jablonski v. Emerson Bd. of Ed., OAL DKT. EDU 6812-82 (March 2, 1983). According to the Board, the decision in that case indicates that where the new position is not substantially identical to the position which was abolished, the holder of the old position may not make any seniority claim to that new one, and the mere fact that the two positions involve some overlap of duties does not make them identical.

In Jablonski, the issue was whether the responsibilities of the new position of Administrative Assistant were substantially identical to the responsibilities of Director of Guidance, the position which Jablonski previously held. The administrative law judge

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reviewed the responsibilities of the two positions and determined that they were not substantially identical. Although the new position did include the duties of the old one, there were "greater and additional responsibilities" required. Ultimately, the agency decision rejecting Jablonski's claim was affirmed by the Appellate Division. See, Jablonski v. Bd. of Ed. of Borough of Emerson (N.J. Appellate Div., A-6100-82T2, March 6, 1984) (unreported). See also, Luppino v. Bayonne Bd. of Ed., 1980 S.L.D. 1028, aff'd, 1980 S.L.D. 1039.

The decision in Santarsiero v. Bd. of Ed. of Parsippany-Troy Hills, OAL DKT. EDU 5667-83, adopted by the Commissioner May 14, 1984, aff'd State Bd. of Ed., October 3, 1984, is also instructive. In that case the administrative law judge, citing the Luppino and Jablonski cases, noted that the focus of inquiry was whether or not the duties performed by petitioners in their previous positions were "substantially similar to the duties performed in the new position of district program supervisor." After reviewing the two positions, the administrative law judge concluded that although both involved some supervisory functions, the duties of the new position were greater than that of the old one and were on a larger scale. As she put it:

> It is the view of this court that service in the building-based extra responsibility of area chairperson is different from the new district-wide, K-12 full-time role of the district program supervisor.... Far from reflecting a mere 'difference in degree,' the Board's 1983 reorganization implemented a fundamental change in supervisory philosophy.... Simply because the two positions may have at times required similar duties does not make them substantially similar so as to require that petitioners be entitled to the position of district program supervisor. Santarsiero, at 20-21.

As noted, the determination of the administrative law judge in Santarsiero was affirmed by the Commissioner and ultimately by the State Board of Education. In his affirmance, the Commissioner made the following pertinent observation:

> Mere overlap of duties between the two positions does not make them identical nor is the difference between the two positions merely quantitative. Ibid. at 27.

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See also, Frissell v. Bd. of Ed. of West Orange, OAL DKT. EDU 20-85 (May 21, 1985), adopted by the Commissioner of Education, July 8, 1985, and Burghart v. Bd. of Ed. of Manchester Regional School District, OAL DKT. EDU 6541-84 (March 11, 1985), adopted by the Commissioner of Education, April 25, 1985.

FINDINGS OF FACT

Based upon my review and consideration of the evidence and the testimony in this case, I herewith make the following **FINDINGS OF FACT:**

1. Petitioner, John Sandri, began his service in Bergen County Vocational School District in 1968 as a teacher.

2. Petitioner continued serving as a teacher until 1972 when he was appointed as a guidance counsellor.

3. On or about September 1, 1977, petitioner was appointed to the position of a principal.

4. Petitioner continued to serve as a principal until the 1981-1982 school year when he then began his service as Supervisor of Guidance. Petitioner served under a supervisor's certificate.

5. Petitioner's position of Supervisor of Guidance/Shop at Bergen Tech was abolished, effective July 1, 1985.

6. The position of Assistant Director Special Needs/Student Services was approved by the Board of Education on May 13, 1985. The position became effective on July 1, 1985. The position was approved by the County Superintendent's office.

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7. The individual assigned to the position of Assistant Director Special Need/Students Services was Joyce Chapin. She serves in an "acting" capacity.

8. Abolition of the petitioner's position of Supervisor of Guidance/Shop was the result of an administrative reorganization carried out in the school district stemming from the district's determination to eliminate what it perceived to be undue fragmentation of functions and a need to implement a cohesive, coordinated and integrated planning and operational scheme for carrying out the Board's statutory duties.

9. Creation of the new department now headed by a Director of Special Needs/Student Services was designed to combine student personnel service responsibilities and special need responsibilities into one central district staff department having supervision over each of those areas, and thereby to centralize and coordinate district-wide planning.

10. While some of the performance responsibilities of the former position of Supervisor of Guidance/Shop are similar to, or overlap with, some of the performance responsibilities contained in the job description for the new position of Assistant Director/SNSS, they are not either substantially interchangeable or so similar or identical as to make them the same. While there is some overlap of functions, the new position is broader in supervisory scope and entails additional, district-wide responsibilities which the abolished position did not involve.

11. Elimination of the position of Supervisor of Guidance/Shop, which position was tantamount to that of a department head, was part of the overall program to foster the carrying out of guidance and other student support services on a district-wide basis in an integrated manner, rather than on a more limited, school-wide basis.

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12. Petitioner did not have any district-wide responsibilities while holding the position of Supervisor of Guidance/Shop at Bergen Tech, whereas the duties and responsibilities of the Assistant Director/SNSS carry such district-wide responsibilities.

CONCLUSION

In view of the foregoing Discussion and Findings of Fact and in light of the case law referred to above (see, Jablonski, Santarsiero, Burhardt), it is clear that petitioner has failed to sustain his burden of demonstrating by a preponderance of the credible evidence that the Board's action in abolishing the position of Supervisor of Guidance/Shop, which he held during 1984/85, and the failure to appoint him to the newly-created position of Assistant Director/SNSS was arbitrary, capricious, unreasonable, in bad faith, or in any way violative of his tenure and/or seniority rights in the school district. Rather, the new position is one which, although still in its early stages of development, clearly encompasses and is intended to encompass a much broader range of responsibilities than that which the position previously held by Sandri entailed. While both of the positions necessarily involve supervision of subordinate personnel, oversight with respect to certain aspects of testing, scheduling, etc., there is simply no solid basis upon which the undersigned can conclude that the positions, in light of the established case law, can be said to be basically the same. They simply are not. Accordingly, the petition should be **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF EDUCATION SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

April 28, 1986
DATE

STEPHEN WEISS, ALJ

APR 30 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

APR 30 1986
DATE

Mailed To Parties:

FOR OFFICE OF ADMINISTRATIVE LAW

md/e

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JOHN SANDRI,

PETITIONER,

V. : COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BERGEN COUNTY VOCATIONAL SCHOOL DISTRICT, BERGEN COUNTY, : DECISION

RESPONDENT.

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law, Stephen G. Weiss, ALJ. It is observed that petitioner's exceptions to the initial decision, as well as the Board's reply exceptions, were filed in a timely manner pursuant to N.J.A.C. 1:1-16.4a, b and c.

Petitioner's exceptions to the initial decision are summarized below:

Petitioner avers that he performed the vast majority of the duties contained in the job description for the position of Assistant Director of Special Needs/Student Services (Assistant Director/SNSS) while in his former position of Supervisor of Guidance/ Shop at Bergen County Vocational-Technical High School. Petitioner avers that the major distinction between the two positions in issue is that his former position was "building based" while the position of Assistant Director/SNSS was "district-wide." (Petitioner's Exceptions, at p. 1)

Petitioner contends that the testimony demonstrated that many of the duties of the Assistant Director/SNSS related to supervision within the building in which petitioner had previously been housed. Further, according to petitioner's exceptions, the present holder of the position of Assistant Director/SNSS testified that eighty percent of her work related to matters within Bergen Tech. Petitioner suggests that while the present holder of the new position expects her involvement outside of Bergen Tech to increase, this is "mere speculation" at this point. (Petitioner's Exceptions, at p. 2)

Petitioner further avows:

> In essence, the entire basis of the respondent's position *** is that it expects the position of Asst.. Director of Special Needs/Student Services to become a district-wide position. However, based on the testimony of the person now holding the position, it cannot be said that the position presently has a district-wide basis.***
> (Petitioner's Exceptions, at p. 2)

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Of the sixteen performance responsibilities listed in the job description of the new position, petitioner claims he has performed all but three. While admitting that he was not involved in coordinating a district-wide system of health services, nor did he schedule physical examinations, nor review or approve apprenticeship programs, neither has the present holder of the position assumed such responsibilities.

Petitioner contends that the duties performed by the present Assistant Director are, in fact, so strikingly similar to the duties formerly performed by petitioner while Supervisor of Guidance/Shop that the Commissioner must recognize petitioner's seniority right to the present Assistant Director position. Petitioner requests that the Commissioner reject the initial decision and order the Board to recognize petitioner's seniority to the position of Assistant Director/SNSS.

The Board's reply exceptions urge that the Commissioner adopt the ALJ's findings and decision for the reasons cited therein, relying upon its post-hearing brief, which is incorporated herein by reference.

Having carefully reviewed the record before him, the Commissioner is satisfied that the record of this matter clearly supports the findings and conclusion reached by the ALJ in the initial decision for the reasons set forth therein. Petitioner's exceptions provide no further proof that would persuade the Commissioner to hold otherwise.

The Board has effected a bona fide staff reorganization within the district in an effort to consolidate services. It has the authority thereby to abolish petitioner's former position and assign some of the duties he formerly performed to other staff members along with those never performed by petitioner. See Vexler v. Board of Education of the Borough of Red Bank, 1977 S.L.D. 625; Dunellen Board of Education et al. v. Dunellen Education Ass'n et al., 64 N.J. 17, 31 (1973).

In reaching the above conclusion, the Commissioner is persuaded not so much by a comparison of the number of duties which constituted the difference between petitioner's former position and the newly created one, but by the nature and scope of those newly established responsibilities. See Edward J. Jablonski v. Board of Education of the Borough of Emerson, Bergen County, decided by the Commissioner April 18, 1983, aff'd State Board July 6, 1983 aff'd N.J. Superior Court, Appellate Division, March 6, 1984. See also Thomas J. Santarsiero, supra. By way of example, the Commissioner particularly notes the fact that the new position as established by the Board herein requires the holder of such position to supervise and evaluate staff other than those in the single department wherein petitioner formerly conducted his supervisory responsibilities, reflecting a "fundamental change in supervisory philosophy***." See Santarsiero, at pp. 20-21. The Commissioner notes from the record the fact that child study team functions and evaluations, which were never part of petitioner's position, fall under the purview of the

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newly created position, bespeaking a "district-wide" approach to providing student services and a broader range of responsibility for the holder of the new position.

In conformity with the Commissioner's determination in this matter and the Board's action having been taken in good faith to provide greater efficiency and consolidation of services, as recommended by Dr. Joel Bloom, former director of the New Jersey State Department of Education's R.C.S.U., North, the Commissioner hereby directs the Bergen County Superintendent of schools to maintain close communication with the district to ensure that the consolidation of services begun by this reorganization, undertaken as the first step toward increased district-wide consolidation of services, continues as contemplated by the Board's reorganization.

With nothing new brought to the record by way of exceptions in response to the ALJ's findings and conclusion, the Commissioner adopts those determinations in the initial decision as his own. The instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5476-85
AGENCY DKT. NO. 202-7/85

JOSEPH D. SWALUK,
Petitioner,
v.
HIGHLAND PARK BOROUGH BOARD OF EDUCATION,
Respondent.

Kenneth I. Nowak, Esq., for petitioner (Zazzali, Zazzali & Kroll, attorneys)

James F. Clarkin, III, Esq., for respondent (Borrus, Goldin, Foley, Vignuolo, Hyman & Stahl, attorneys)

Record Closed: March 19, 1986 Decided: May 2, 1986

BEFORE **DANIEL B. MC KEOWN,** ALJ:

Joseph D. Swaluk (petitioner) claims in a Petition of Appeal filed before the Commissioner of Education that the action of the Highland Park Borough Board of Education (Board) by which his employment as Cooperative Industrial Education Coordinator was reduced from a 12 month to a 10 month basis is arbitrary, unreasonable, and capricious. Furthermore, petitioner contends the controverted action of the Board was taken in bad faith and in violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., although this latter charge was withdrawn at hearing. The Board denies the allegations and maintains that its controverted action was and is in all respects proper and legal. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a hearing was

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scheduled and conducted February 10, 1986 at the South Amboy Township Municipal Building, South Amboy. The record closed March 19, 1986 upon receipt of simultaneous briefs by the parties.

BACKGROUND FACTS

The background facts of the matter not in dispute between the parties except as otherwise noted are as follows. Petitioner was first employed by the Board in 1964 as an industrial arts teacher on a ten month a year full time basis. In 1972, the Board appointed petitioner to the 12 month position of Cooperative Industrial Education Coordinator (CIE Coordinator), accompanied by a salary increase, which position he held on a 12 month a year basis through June 30, 1985. Petitioner possesses proper certification for the positions of industrial arts teacher and CIE Coordinator.

Some time after January 1, 1985, the Board realized its 1985-86 current expense budget was $650,000 in excess of its budget cap.[1] The Board further realized that certain budget adjustments had to be made to bring its total proposed 1985-86 expenditures closer to its cap figure. That these budget concerns were facing the Board was a fact of common knowledge in the local school community. The Highland Park Administrative Council, ostensibly comprised of school administrators under the direction of the superintendent, recommended the reduction of the 12 month position of CIE Coordinator to 10 months in order to save $3,500. The council and the Board believed the Coordinator's job could be performed in 10 months. In fact, according to the principal of the school where petitioner is assigned, it is petitioner's effectiveness as CIE Coordinator which allows the duties to be effectively performed in 10 months. The principal explained that petitioner has an excellent relationship with local employers. Hence, some employers continue participation in the cooperative industrial education program year after year.

Petitioner explained he learned his 12 month position was targeted for reduction to 10 months in the following manner:

> Q. And how did it come about that you heard that [the Board was to reduce your employment to 10 months] ?

---

[1]See N.J.S.A. 18A:7A-25.

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A. Well, there were all sorts of rumors going around that there was going to be reductions because of a budget shortfall, and a list came out which was available at the school showing proposed cuts, staff cuts, and listed in the proposed staff cuts was the reduction of the 12-month CIE coordinator to 10 months, so I became — it was known to me that there was the possibility that this was going to happen.

Q. Now, did you attend a board meeting at which this was discussed?

A. I attended a board meeting in which I was informed that due to Sunshine Law I was going to be allowed to state my case to the board of education as to why my cut should not be made.

Q. And did you attend that meeting?

A. Yes, I did.

Q. And the board voted to cut your position?

A. Yes, they did.

Q. Approximately when was that? Do you recall?

A. I would say sometime maybe in March. It was in the early spring or late winter of '84-'85. *** (T8-9)

Shortly after the Board determined to reduce petitioner's employment to 10 months, the department chairperson for industrial arts advised him that it was likely he would be assigned to teach one wood shop course for eighth grade students. Petitioner then discussed his 10 month course load schedule with the principal and vice-principal. Petitioner expressed concern about the additional course he was to teach while continuing his duties as CIE Coordinator. Petitioner was advised that the two cooperative education classes he had in 1984-85 would be combined into one for 1985-86 so that his actual classroom time in 1985-86, with the wood shop class, would be the same as in 1984-85. When petitioner persisted in his view that he needed 12 months to effectively perform as CIE Coordinator, the principal advised him to do the best he could.

Petitioner's basic contention is that the Board through its action is directing him to perform all duties as a 12 month CIE Coordinator in a 10 month period of time because none of the duties he performed in 12 months were taken from him when the Board reduced his employment to 10 months. Additionally, petitioner contends he is now assigned more classroom time and more pupils than he had when he was performing on a 12 month basis while still being expected to perform all CIE Coordinator duties in 10 months.

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It is noted that though the title "Cooperative Industrial Education Coordinator" is not a title strictly stated in State Board of Education rules and regulations, its rule at N.J.A.C. 6:11-12.3 does recognize the title "Vocational-Technical Coordinator; Cooperative Industrial Education Programs" which identifies the required endorsement, which petitioner possesses, to an Educational Services Certificate

> * * * for the position of teacher and coordinator of part-time cooperative vocational education and skilled trade, industrial and/or service occupations. The endorsement entitles the holder to teach related vocational subjects in such classes and to act as coordinator between school and industry * * *

In light of the foregoing, the title "Cooperative Industrial Education Coordinator" satisfies the Board's obligation at N.J.A.C. 6:11-3.6(a) to "* * * assign position titles to teaching staff members which are recognized in these rules."

While the Board has no job description covering petitioner's employment as CIE Coordinator, petitioner, in anticipation of this hearing, prepared a list of duties (P-1) he performed over the years as CIE Coordinator which list is not disputed by the Board. Consequently, I find the following to accurately reflect the duties petitioner performed and continues to perform as CIE Coordinator:

1. Cooperative Industrial Education Coordinator.

   A. Interview all prospective student workers to determine direction of work experience.

   B. Locate appropriate job sites for student workers.

   C. Visit employers to solicit jobs for the student workers.

   D. Help students through the process of job application, interview and procurement of working papers.

   E. Make periodic visits to student workers job sites.

   F. Evaluate and grade each student worker.

   G. Teach the Cooperative Education related class which provides related information for working students.

   H. Provide independent study materials for those students whose schedule does not allow for them to be in the related class.

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I. Consult with counselor on the progress of each student worker.

2. Work Study Coordinator.

A. Interview prospective students for jobs within the school system.

B. Locate jobs for those students and make placements.

C. Make periodic checks of those students with their job supervisors to determine their progress.

D. Evaluate and grade each student worker.

E. Collect time sheets and distribute checks.

3. J.T.P.A. [Job Training Partnership Act] work study coordinator.

A. Apply for J.T.P.A. program funding.

B. Collect all documentation needed to certify students for program.

C. Locate jobs for students and make placement.

D. Periodically check on student progress on the job.

E. Evaluate and grade each student.

F. Collect time sheets, deliver to New Brunswick office, and distribute checks.

4. Liason (sic) with N.J. Department of Vocational Education.

A. Attend meetings and apply for Federal Vocational Education funds for Highland Park.

B. Coordinate the writing of program proposals by staff.

C. Write program proposals for the programs I am directly responsible for.

D. Complete all documentation and reports required by the Department of Vocational Education.

E. Purchase supplies and equipment for the vocational program I am responsible for.

5. Highland Park High School Staff duties.

A. Conduct homeroom 9-3.

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B. Detention duty (after school) 1 marking period.

C. Chaperone two High School events.

D. Attend all faculty meetings and work shops.

Cooperative industrial education, work study, and the Job Training Partnership Act, each focus upon the high school pupil who does not intend to further his/her academic education after high school graduation. Cooperative industrial education relies upon community employers to employ pupils on a part-time basis for academic credit while the pupils continue to attend cooperative industrial education related classes learning how to budget money, prepare state and federal income tax returns, and so on. Work study and the Job Training Partnership Act focus generally on the same kind of pupil who does not intend to seek further academic education as in cooperative industrial education, except these two programs rely upon the Board to employ pupils on a part-time basis throughout the school system. The issue in this case, however, is predicated upon petitioner's duties as CIE Coordinator and the cooperative industrial education program, with work study and the Job Training Partnership Act being additional sources of funds to support in a limited way the goals of cooperative industrial education; to ease pupils into the work force under school supervision. Petitioner's duties regarding these two programs have always been and continue to be performed during the academic year. In fact, petitioner's own testimony shows that the work study program, which presently has seven pupils compared to ten in 1984-85 and I infer the Job Training Partnership Act program which has eight pupils compared to five in 1984-85, requires "...nowhere near the amount of time that [cooperative industrial education does] " (T.69).

Since 1972 when petitioner was first employed as CIE Coordinator through the present, 24 to 26 pupils on average participate each year in the cooperative industrial education program. Some years the total enrollment decreases to 20 pupils, while in other years the enrollment may reach 34. During 1984-85, 24 pupils were enrolled in cooperative industrial education while 26 pupils are presently enrolled in the program during 1985-86.

Pupils who enroll in cooperative industrial education and who are employed receive credit for graduation purposes for such employment. Credit may be received by the pupil for employment between September through June during which petitioner monitors their employment progress. Although the pupil may continue to be employed by

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their employer during the summer months, no academic credit is awarded for summer employment and petitioner is not obliged, nor does he, monitor their employment during the summer months.

Turning now to petitioner's prior employment as CIE Coordinator on a 12 month basis compared to his present employment on a 10 month basis, the following facts are not in dispute between the parties. While on a 12 month basis petitioner was paid his salary in 24 equal installments. He was, of course, employed during July and August during which he was allowed 20 or 22 days paid vacation. On a 10 month basis, petitioner's salary is lesser than it would be on a 12 month basis and he receives his full salary in 20 equal installments. Petitioner is not entitled to paid vacation during July or August.

Setting aside for the moment petitioner's work obligations during July and August while on 12 months, his arrival and departure times during the 10 month academic year and his time for lunch remains the same as they were while he was on a 12 month basis. That is, petitioner was and is obligated to report for duty at 8:05 a.m. and he was free to leave at 3:08 p.m. There were and are eight class periods of approximately 44 minutes each during the course of the regular school day and petitioner receives the equivalent of a class period for lunch. During the 1984-85 academic year before his employment was reduced to 10 months, petitioner taught two cooperative industrial education related classes of 12 or 13 pupils each, five days a week. Because the two separate classes were identical in subject matter, petitioner needed one preparation period for both classes. During the second semester of 1984-85, petitioner also taught on a volunteer basis one class of Employment Orientation three days a week for pupils in need of special education. Because petitioner was not queried nor did he volunteer that he needed an additional preparation period for Employment Orientation, I infer that because the course was on a volunteer basis petitioner did not need a separate preparation period for this course. During the present 1985-86 academic year, petitioner teaches one cooperative education related class of 21 pupils which represents a joining of the two such classes he had the prior year. He also supervises five students engaged in what he calls independent work study. Once again, this cooperative education related class requires one preparation period of petitioner. Petitioner is also presently obligated to teach one class of wood shop to eighth grade pupils otherwise not associated with cooperative industrial education. This class requires of petitioner one preparation period. Over the course of the year, petitioner will have taught about 88 students wood shop, 22 students in each of four cycles in which the academic year is divided.

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When petitioner was employed on a 12 month basis and during the academic year while he was teaching two separate cooperative industrial education related classes and the Employment Orientation he volunteered to teach, he was asked how he spent the remaining time in his daily schedule. Petitioner responded in the following manner:

> The open time in my schedule is to give me time to do my other duties, like take care of work study, collect time sheets, and to go out and check on the students, because they are working during the school day. (T-68)

Pupils selected cooperative industrial education as part of the regular course selection which occurred in April. Petitioner interviewed each student during April, May and June for employment the following year. He also made efforts to locate appropriate job locations during the same three month period of time (T-41). Nonetheless, petitioner also testified that while he was employed on a 12 month basis, he used the summer months to interview, locate appropriate jobs for students, visit employers to solicit jobs for students, help students with applications, job interviews, and securing working papers. In further explication of the duties performed during the summer months while he was on a 12 month employment basis, the following questions and answers are illustrative of petitioner's "summer" duties:

> Q. Now, can you describe for the Court how much was involved? First of all, how many weeks during the summer would you work?
>
> A. I guess it would come out to approximately a six or seven. I had the standard vacation which I believe was 20 or 22 days, is it? And I was expected to be there the rest of the time.
>
> Q. Again, could you describe what was involved during the summer months in performing these duties?
>
> A. Well, I would get the names and addresses and phone numbers of all the students I was going to have, and I would contact them and have them come in and I would talk with them individually. That would usually take me the first couple of weeks. Or, I would go out and see them if I had to, and I would start to get a feeling for where I needed to look for employment and then I would just get in my car and go out and look for it.
>
> Q. You would drive around to various employers?
>
> A. Drive around to various, yes, place of employment, talk with employers, talk with owners, talk with managers, trying to

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determine whether they needed somebody and whether I could give them somebody.

Q. Did you do anything else over the summer?

A. Other than looking for employment? And then helping the students to get their working papers or something, no, that would be it. (T-22-23)

In regard to his duties to act as liaison with the New Jersey Department of Vocational Education petitioner testified, which I accept as fact, that during the time he was employed on a 12 month basis and was in fact on the job during the summer months he may have received a telephone call or two from the Department regarding applications for federal aid he may have submitted.

Petitioner was not employed during the 1985 summer months because his reduction of employment from 12 months to 10 months became effective July 1, 1985. No one else was assigned by the Board for the 1985 summer months to perform duties otherwise performed by petitioner in prior months. Consequently, in September and October 1985, petitioner performed all duties he otherwise would have performed during the summer months while on a 12 month basis by working harder, longer, taking a shorter lunch period and through the more efficient use of his time (T-25). Petitioner accomplished each and every task assigned him in 1985-86. While petitioner agrees the Board did not increase his hours in 1985-86 compared to his hours in prior years petitioner contends because the Board no longer affords him the six weeks in the summertime to solicit jobs, he was obligated, as he says, "I would say in a minimum I worked maybe an additional 40 hours over what I would normally do during those first two months [September and October] " (T-64).

Petitioner testified as follows regarding his view that the Board's controverted action is arbitrary, capricious, and unreasonable:

* * *

A. Well, because no one really came to me and or even really talked to me about this. I kind of found out that they were even making the move kind of second hand. No one said anything to me until — no one said anything official to me until I was informed to come to that board meeting where I was going to be given a chance to voice my objection to this, and then after the cut was made no one said anything to me,

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period, about it. No one said this — " 'We're not going to ask you to do this anymore or we're not going to expect you to do this.' " As a result everyone expected me just to go on and do whatever I was doing before in 10 months instead of 12.

Q. So the thrust of your complaint is then not that your duties have increased but that the board is asking you to perform the duties in 10 months instead of 12 months?

A. Plus the fact that I've been given a second preparation now. I've had this for an entire year, the wood shop class. (T:58-59)

The record establishes as fact that when petitioner's position was reduced from 12 to a 10 month basis, he was not required to work during the summer to find jobs for pupils and he was not required to work more hours during the academic year either to find jobs or to perform his duties as CIE Coordinator. Finally, it is noted that the controverted action by the Board to reduce petitioner's employment from 12 to a 10 month basis is in no way intended to reflect adversely upon petitioner's performance in the Board's employ.

From the foregoing undisputed background facts, I **FIND** the operative facts to be as follows:

1. Petitioner has been employed by the Board as CIE Coordinator on a 12 month basis since 1972 and he has acquired a tenure status as CIE Coordinator. He has in all respects performed his obligations in an efficient manner. Twenty-four to 26 students on average enroll in the Cooperative Industrial Education Program.

2. During the 1985 spring, the Board was confronted with a budgetary problem in that its proposed 1985-86 school budget was $650,000 in excess of its statutory cap limit. Petitioner had knowledge of the budget problem and the likelihood his 12 month employment would be reduced to ten months.

3. The administrative council recommended that the Board reduce the position of CIE Coordinator from 12 months to 10 months, thereby saving $3,500. This recommendation was predicated upon the belief that the duties and obligations of the CIE Coordinator could be efficiently

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performed in a 10 month period. Shortly after the Board reduced petitioner's employment to ten months, the department chairperson and the principal separately discussed with petitioner his 1985-86 schedule.

4. Petitioner, during 1984-85, taught two separate classes of cooperative industrial education. These two classes were combined into one class for 1985-86 which petitioner continued to teach. Petitioner was also assigned in 1985-86 one class of wood shop for pupils in the eighth grade. Consequently, petitioner was formally assigned as many class hours in 1985-86 as he was assigned in 1984-85. There is no evidence to show that petitioner volunteered in 1985-86 to teach Employment Orientation to pupils in need of special education.

5. Petitioner performed all duties and obligations expected of him as CIE Coordinator, including his two class teaching schedule, in the time expected of him during 1985-86. While the 1985-86 academic year is not yet concluded, it is reasonable to presume petitioner's effectiveness in his employment will continue the last several weeks as in the preceding eight months.

6. The Board reduced petitioner's employment from a 12 to a 10 month basis in order to effectuate a savings of $3,500.

7. No duties assigned petitioner prior to 1985-86 have been reassigned to any other teaching staff member. In fact, petitioner has testified that he has performed all duties as CIE Coordinator which were assigned him on a 12 month basis during the course of the present academic 10 month year.

8. Petitioner was not obligated by the Board nor by any administrator to put in extra hours during September or October 1985, in order to achieve his job duties, nor has there been evidence presented by petitioner to demonstrate that absent the asserted 40 hours of extra work he did put in he would not have been able to accomplish his job tasks.

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This concludes a recitation of the background facts not in dispute between the parties and a recitation of the operative facts necessary for adjudication of the issues presented.

LAW AND DISCUSSION

While petitioner has acquired a tenure status in the employ of the Board as CIE Coordinator, that tenure status does not provide a shield against which the Board cannot exercise its authority under N.J.S.A. 18A:28-9 which provides in full as follows:

> Nothing in this title or any other law relating to tenure of service shall be held to limit the right of any board of education to reduce the number of teaching staff members, employed in the district whenever, in the judgment of the board, it is advisable to abolish any such positions for reasons of economy or because of reduction in the number of pupils or of change in the administrative or supervisory organization of the district or for other good cause upon compliance with the provisions of this article.

As petitioner points out, a board must exercise its discretion under N.J.S.A. 18A:28-9 in good faith in consonance with a teacher's rights as guaranteed by law. Viemeister v. Prospect Park Bd. of Ed., 5 N.J. Super. 215 (App. Div. 1949). In this case, there is no evidence to demonstrate the Board acted in bad faith or for reasons other than legitimate interests of economy in its determination to reduce petitioner's employment from a 12 to a 10 month basis. Nonetheless, if the need for the abolished position still exists and the Board's action was taken to defeat the salary rights of a teacher, even where legitimate interests of economy exist, its determination to abolish a 12 month position and create in its stead a 10 month position will be set aside. Viemeister, 5 N.J. Super. at 218.

There is no proof whatsoever presented by petitioner that there is a need for his employment as CIE Coordinator to be on a 12 month basis, as opposed to a 10 month basis. At best, petitioner's evidence shows that during the summer months when he was on the job he interviewed prospective students although he simultaneously testified he interviewed students during April, May and June. In addition, petitioner explained he located jobs for student workers during the summer months, although he simultaneously testified he spent April, May and June also looking for jobs. This kind of evidence does not demonstrate that a need exists for the position of CIE Coordinator to be on 12 month

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basis in light of the Board's statutory authority to abolish positions for reasons of economy and in light of the clear evidence petitioner fully performed his employment duties on a 10 month basis.

Petitioner's reliance upon a recent decision of the State Board of Education, Sorenson v. Bd. of Ed. of Wayne, 1985 S.L.D. - (Aug. 9, 1985) is not helpful to his cause. In that case, the State Board held that the controverted position of guidance director continued to be necessary after the board reduced that position from a 12 to a 10 month employment basis. In the present case, there is no such evidence to show the CIE Coordinator's position is necessary to be carried on a 12 month basis.

Finally, petitioner remains employed on a full-time basis, although 10 months as opposed to 12 months.

CONCLUSION

Based on the foregoing operative facts, together with the law and the discussion thereunder, I **CONCLUDE** petitioner has failed to establish by a preponderance of credible evidence that the Board acted arbitrary, capricious or unreasonable, or that it acted in bad faith, when it took action to reduce his 12 month position of employment as CIE Coordinator from 12 month to 10 months. I further **CONCLUDE** that the Board acted within its statutory authority to abolish positions for reasons of economy and that, in the absence of bad faith or illegality, its judgment regarding the staffing of its schools is not subject to interference.

The petition of appeal is **DISMISSED.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

May 2, 1986
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

MAY 5 19[illegible]
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE MAY 7 1986

Ronald L. Parks & S.
OFFICE OF ADMINISTRATIVE LAW

ml

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EXHIBIT LIST

P-1 Job duties of CIE Coordinator

R-1 List of students in CIE

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JOSEPH D. SWALUK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is noted that no timely exceptions to the initial decision were filed by the parties pursuant to the applicable provisions of N.J.A.C. 1:1-16.4a, b and c.

In the Commissioner's judgment, the ALJ properly concluded that the undisputed facts in the instant matter, as well as the testimony of the witnesses, failed to support petitioner's claim that the Board's action in abolishing his 12-month position as Coordinator of Cooperative Industrial Education (CIE Coordinator) and creating a 10-month position of employment for him in its stead was arbitrary, capricious or taken in bad faith.

It stands unrefuted in the record that some time after January 1, 1985 (1984-85 school year), the Board realized that its current expense budget for the 1985-86 school year was $650,000 in excess of its lawfully permitted budget cap. (N.J.S.A. 18A:7A-25) Consequently, the Board took the necessary steps to reduce its 1985-86 current expenses by $650,000.

As part of its overall effort to reduce its budget, the Board was required to effect a reduction in force for reason of economy. (N.J.S.A. 18A:28-9) Among the positions affected was petitioner's 12-month position of CIE Coordinator. The Board abolished the 12-month position and its related duties during the summer months and created a 10-month position for petitioner with a 10-month rate of pay. Petitioner was thereby relieved of those duties which he performed in the summer months. (P-1) None of the above-referenced duties required classroom teaching during the summer months. In fact, although the CIE program had been expanded to cover the summer months prior to the 1985-86 school year, the actual program was intended to be operated on a regular 10-month basis. The record supports this finding inasmuch as pupil grades

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were determined on a 10-month basis regardless of whether a pupil was engaged in summer employment.

It is not disputed that the activities in which petitioner was engaged during the summer months (P-1) were intended to benefit those pupils engaged in summer employment and also provide advance preparation for the program spanning the 10-month regular school year. There is no evidence in the record to show that the summer program was required in order to comply with the federal guidelines for the CIE program or that petitioner was unable to fulfill the necessary requirements of the program on a 10-month basis.

Hence, except for visiting students on job sites during the summer, any activities conducted by petitioner with respect to interviewing prospective student workers, locating job sites, visiting employers, and assisting students with job applications were more properly designed to be accomplished during the regular 10-month school year, but they were expanded to cover a 12-month period solely for the purpose of accommodating or facilitating the required implementation of a 10-month program.

In the Commissioner's judgment, petitioner may not therefore rely on those activities which he performed during the summer months to establish that his duties were not reduced when his employment was changed from 12 months to 10 months at the beginning of the 1985-86 school year. He was required to perform those duties on a 10-month basis in order to be in compliance with the prerequisites for federal program funding.

Consequently, the Commissioner finds and determines that petitioner's responsibility for the summer program was, in fact, eliminated when the Board abolished his 12-month position as CIE Coordinator for the 1985-86 school year and created a 10-month position in its stead.

Finally, it further appears that petitioner attempts to claim that his teaching workload has increased by virtue of the fact that he has been required to teach an industrial arts class during the 1985-86 school year and also because the two CIE classes he taught during the 1984-85 school year have been combined into one class for the 1985-86 school year. The Commissioner is without jurisdiction to render judgment on this specific claim which is more properly related to terms and conditions of employment and therefore subject to the collective negotiations process embodied in the negotiated agreement between the Board and the representative association. Consequently, any claim petitioner may have in regard to changes in his terms and conditions of employment is reviewable on appeal to the Public Employment Relations Commission.

In view of the reasons stated above, the Commissioner hereby affirms the initial decision which concludes that the Board's action in abolishing petitioner's 12-month position and creating a 10-month position of CIE Coordinator for the 1985-86 school year was

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not arbitrary or taken in bad faith, but rather such action was within the Board's legitimate authority pursuant to N.J.S.A. 18A:28-9.

Accordingly, the instant Petition of Appeal is hereby dismissed.

COMMISSIONER OF EDUCATION

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6256-85
AGENCY DKT. NO. 322-9/85

EPHRAIM R. KELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,
Respondent.

Jeffrey A. Bartges, Esq., for petitioner

Peter M. Tourison, Esq., for respondent (James & Tourison, attorneys)

Record Closed: March 21, 1986 Decided: May 2, 1986

BEFORE **LILLARD E. LAW,** ALJ:

Petitioner, the former tenured superintendent of schools in the employ of the Board of Education of the Lower Cape May Regional School District (Board), seeks a declaratory judgment concerning the application of the statutory provisions under N.J.S.A. 18A:30-3.2, N.J.S.A. 18A:30-3.3 and N.J.S.A. 18A:30-3.4 alleging, among other things, that the Board denied his entitlement to payment for accrued unused sick leave days, earned while employed by other New Jersey school districts upon his retirement, pursuant to the Board's adopted policy. The Board denies the allegation setting forth four separate defenses, contending that: The matter is time barred; Estoppel; Waiver and, among other things, petitioner and the Board entered into a negotiated agreement, in good faith, whereby petitioner's out-of-district accrued sick days were traded off for increased salary for the school years 1983-84 and 1984-85.

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Petitioner filed his Petition for Declaratory Judgment, dated July 1, 1985, before the Commissioner of Education on September 18, 1985, pursuant to N.J.S.A. 18A:6-9. The Board filed its Answer thereto on September 25, 1985. Thereafter, on October 1, 1985, the Commissioner transmitted the matter to the Office of Administrative Law for determination as a contested case, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq. On November 20, 1985, a prehearing conference was held at which, among other things, the issues to be determined by this administrative tribunal were agreed upon and set forth as follows:

1. Whether the Board adopted an appropriate resolution to transfer petitioner's accrued unused sick leave from another school district to be applied to petitioner's accrued sick leave in the Board's school district, pursuant to N.J.S.A. 18A:30-3.2?

2. Whether the Board's past practice of granting payment for unused sick leave, including transferred accumulated unused sick leave time, upon a teaching staff member's retirement should now be uniformally applied to petitioner and others similarly situated?

3. Whether petitioner had the ability to waive his equal treatment of payment for transferred accumulated unused sick leave upon his voluntary entering into a contract with the Board for a higher salary?

4. Whether petitioner's Petition of Appeal is time barred?

Thereafter, on February 11, 1986, a hearing was conducted at the Woodbine Municipal Court. The parties requested, and were granted, leave to file posthearing briefs and memoranda of law. Upon receipt of the last submission, the record was considered closed on March 21, 1986.

THE STATUTES IN DISPUTE

The statutes upon which petitioner relies in his application for declaratory judgment are found at Chapter 30, Article 1, Sick Leave, of Title 18A, Education Laws, and are recited hereinbelow as follows:

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N.J.S.A. 18A:30-3.2 Credited with unused sick leave

Whenever a board of education employs any person who has an unused accumulation of sick leave days from another school district in New Jersey, the employing board may grant, not later than the end of the first year of employment, part or full credit therefor. The amount of any such credit shall be fixed by resolution of the board uniformly applicable to all employees and subject to the provisions of this chapter.

N.J.S.A. 18A:30-3.3 Certificate issued showing unused sick leave

Upon termination of employment of any employee from any school district, the board shall issue, at the request of the employee, a certificate stating such employee's unused accumulation of sick leave days as of the date of such termination. Such certificate shall be filed with the new employer within one year of the date of such new employment.

N.J.S.A. 18A:30-3.4 Accumulation of sick leave credited; use; accumulation; leave irrevocable

The accumulation of sick leave days from another district, when granted in accordance with this chapter, shall be credited upon receipt of the certificate of the prior employer. The days of sick leave so credited may be used immediately or if not so used shall be accumulative for additional leave thereafter as may be needed. The number of such days when granted shall be irrevocable by the board of education of the district.

UNCONTESTED FACTS

A review of the testimony proffered at hearing, together with those exhibits offered into evidence by the parties (See: Inventory of Documents in Evidence attached hereto) revealed certain facts which are neither in dispute nor contested. Those uncontested facts are set forth hereinbelow and are adopted herein as **FINDINGS OF FACT:**

1. The Lower Cape May School District was created pursuant to statute N.J.S.A. 18A:13-1 et seq., with the first meeting of its Board occurring on June 18, 1956.

2. The school district became fully operational on or about January 1, 1961, when it moved into its building facility.

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3. The Board's first superintendent of schools was Paul Schmidtehen, now retired.

4. Sonia Mathews has been employed as a secretary in the superintendent's office, on a part-time and full-time basis, since in or about the 1960-61 school year.

5. Ms. Mathews has served on a full-time basis as the superintendent's secretary for the past ten years.

6. Ms. Mathews' duties and responsibilities involve, among other things, the recording of, and accounting for, certain personnel attendance records including, among other things; (1) individual employees' annual allowance of sick-leave days, pursuant to N.J.S.A. 18A:30-2, (2) sick-leave time transferred from out-of-district, (3) accumulated sick-leave time, (4) days absence from duty attributable to sick leave, personal days and/or for school business purposes with the date recorded for such absences.

7. Ms. Mathews was, and is, the custodian of personnel attendance records for the Board.

8. Jane D. Turkington, Board secretary, has served in such capacity for 25 years, having commenced employment on or about the time the Board's regional school facility became operational.

9. The Board entered into an agreement with the Lower Cape May Regional Education Association (Association) for the 1979-81 school years which provided, in part, for sick-leave reimbursement to teaching-staff members who retire from its district with unused sick leave accumulated in excess of 75 days. The Board's policy is set forth hereinbelow, in full, as follows:

ARTICLE XXVI
SICK LEAVE REIMBURSEMENT

Teachers who retire from the district and qualify for pension in accordance with the provisions of the Teacher's Pension and Annuity Fund shall be reimbursed for unused sick leave in excess of

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seventyfive (75) days at the rate of 20% of his/her per diem (calculated at 1/200 of annual salary at time of retirement) rate provided at least fifteen (15) years of teaching has been completed in the Lower Cape May Regional School District.
[P-13]

10. On December 17, 1981, the Board amended its sick leave policy to provide, among other things, as follows:

> 4. The Board will grant credit to incoming employees formerly employed by other districts for all days of accumulated sick days.
> [P-3]

11. Prior to December 17, 1981, the Board had no written policy with respect to the granting of out-of-district accumulated sick-leave days to its then present employees or new hires.

12. Prior to December 17, 1981, during Jane D. Turkington's service as Board secretary, the Board took no formal action to grant out-of-district accumulated sick-leave days to its employees, pursuant to N.J.S.A. 18A:30-3.2.

13. Charles Wilson, a teaching-staff member, now retired, was employed by the Board commencing with the 1969-70 school year and was granted 54 accumulated sick-leave days transferred from the Bridgeton, New Jersey public school district. Mr. Wilson had taught for 16 years in the Bridgeton schools prior to his employment with the Board.

14. The Board took no formal action with respect to Charles Wilson's transferred 54 accumulated sick-leave days from the Bridgeton School District.

15. For the 1981-1983 school years, the Board and Association entered into an agreement which provided, in part, as follows:

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ARTICLE XXV
SICK LEAVE REIMBURSEMENT

For the school year 1981-1982, teachers who retire from the district and qualify for pension in accordance with the provisions of the Teacher's Pension and Annuity Fund shall be reimbursed for unused sick leave in excess of seventy-five (75) days at the rate of 20% of his/her per diem (calculated at 1/200th of annual salary at the time of retirement) rate provided at least fifteen (15) years of teaching has been completed in the Lower Cape May Regional School District.

Commencing the school year 1982-83, teachers who retire from the district and qualify for pension in accordance with the provisions of the Teacher's Pension and Annuity Fund shall be reimbursed for unused sick leave at the rate of 25% of his/her per diem (calculated at 1/200th of annual salary at the time of retirement) rate provided at least fifteen (15) years of teaching has been completed in the Lower Cape May Regional School District.

[R-10, p.39]

16. For the 1983-1986 school years, the Board's policy was amended by agreement between it and the Association as follows:

ARTICLE XXV
SICK LEAVE REIMBURSEMENT

Teachers who retire from the district and qualify for pension in accordance with the provisions of the Teacher's Pension and Annuity Fund shall be reimbursed for unused sick leave at the rate of 25% of his/her per diem (calculated at 1/200th of annual salary at the time of retirement) rate provided at least ten (10) years of teaching has been completed in the Lower Cape May Regional School District.

[R-11, p.39]

17. Charles Wilson retired from the Board's employ at the conclusion of the 1982-83 school year and was granted payment of $3,885.21 for 126 unused accumulated sick-leave days, 54 of which were transferred from out-of-district (P-5).

18. Petitioner was employed by the Board in the position of superintendent of schools in August 1972 and subsequently acquired a tenure status in that position.

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19. During his first year of employment with the Board, petitioner requested, and was in receipt of, a letter from the Englewood Board of Education representing that petitioner had accrued 87.5 days of unused sick-leave days while employed by the Englewood Board (P-1).

20. Petitioner's accrued sick leave from the Englewood Board was recognized by agents of the herein respondent Board within the first calendar year of his employment.

21. In or about 1984, petitioner represented to the Board his intention to retire from his tenured position in or about 1985.

22. In contemplation of his retirement, petitioner and the Board entered into contract negotiations which culminated in an instrument entitled "Superintendent's Employment Contract", dated June 13, 1984, and subscribed to by petitioner and the Board (P-9).

23. The superintendent's employment contract incorporated, among other things, clause No. 5., which reads as follows:

> 5. PAYMENT FOR UNUSED SICK DAYS UPON RETIREMENT
>
> At the time of KELLER'S retirement from the Lower Cape May Regional School District on or before June 30, 1985, KELLER shall be entitled to payment for unused sick days accumulated while in the employment of the BOARD at the rate of $56.25 per day. This payment for unused accumulated sick days shall only cover those unused sick days accumulated by KELLER while in the employment of the BOARD.
>
> [P-9]

24. Pertinent clauses in the negotiated contract between petitioner and the Board included, among others, the following:

> 2. SALARY
>
> A. For the 1983-1984 school year, i.e., the period from July 1, 1983 through June 30, 1984, KELLER shall receive the total salary of FIFTY THOUSAND ($50,000.00) DOLLARS, which shall be payable in twenty-four (24) semimonthly installments.

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B. For the 1984-1985 school year, i.e. the period from July 1, 1984 through June 30, 1985, KELLER shall receive the total salary of FIFTY-FOUR THOUSAND ($54,000.00) DOLLARS which shall be payable in twenty-four (24) semi-monthly installments.

3. RETIREMENT In consideration for the salaries set forth in this agreement, KELLER acknowledges, represents and agrees that he will, in fact, unconditionally retire from his position as Superintendent and employment by the BOARD on or before June 30, 1985.

. . .

7. ENTIRE CONTRACT This agreement constitutes the entire contract between KELLER and the BOARD and neither KELLER nor the BOARD shall be bound by any representations or promises unless specifically set forth herein.

[P-9]

25. During the course of the Board's negotiations with petitioner, the Board's negotiating chairperson, Stephen Todd, advised petitioner that the Board did not intend to award retiring employees payment for unused sick leave accrued in out-of-district employment.

26. As a consequence of Board member Todd's advice to petitioner, petitioner notified the local teacher's union representative, by way of letter dated August 7, 1984, that sick-leave days accumulated and transferred from other school districts would not be recognized by the Board and, therefore, would be stricken from the Board employees records (R-3).

27. Based upon the information supplied to it by petitioner, the teacher's union brought a grievance against the Board alleging a violation of the Professional Employees Agreement.

28. The grievance was resolved on October 26, 1984, whereby the Board granted those teachers then in its employ with out-of-district transferred accumulated sick leave days upon retirement (R-7).

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29. Subsequently, by letter dated April 25, 1985, petitioner requested the Board to pay him for the unused sick leave days he had accumulated while employed by the Englewood, New Jersey Board (P-11).

30. On or about June 27, 1985, the Board denied petitioner's request for payment of out-of-district accumulated sick leave days upon his retirement.

31. On or about June 30, 1985, petitioner resigned and retired from the Board's employ and was compensated at the rate of $56.25 per day for those unused accumulated sick leave days earned while employed by the Board.

DISCUSSION AND CONCLUSIONS

The proofs in this matter clearly demonstrate that the Board took no affirmative action to incorporate in its policy the provisions embodied in N.J.S.A. 18A:30-3.2 et seq. to provide its employees with out-of-district unused accumulated sick days prior to December 17, 1981 (P-13). On that occasion, the Board duly adopted a resolution and policy to "grant credit to incoming employees formerly employed by other districts for all days of accumulated sick days." (P-3). Notwithstanding, and absent any affirmative Board action prior thereto, the proofs further demonstrate that immediately subsequent to the school district becoming operational on or about January 1, 1961, the Board's agents had, in fact, provided new hires with credit for out-of-district accumulated sick-leave time to be tacked onto their in-district sick-leave time. It is apparent, therefore, that by its action on December 17, 1981 (P-3), the Board ratified a past practice which, presumably, had its genesis in the office of the superintendent of schools.

The record herein shows that the Board adopted (P-13) and amended (R-10) its policy to provide, with certain conditions, reimbursement for unused sick leave upon a teaching-staff member's retirement from the Board's employ. As a consequence of the Board's adopted and amended policy, at least three former employees were granted payment upon their retirement for unused accumulated sick-leave days, including accumulated out-of-district sick leave, (P-5, P-7). The issue as to whether a local board of education may compensate its employees for unused sick leave upon retirement has

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been settled in the matter of Maywood Ed. Assn. Inc. v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Chan. Div. 1974), wherein the court held, among other things, that such payments are within the discretion of the public employers under existing statutory authority to compensate their employees. Id. at 555.

As to Issue No. 1, there is no record in the Board's minutes, or other official memoranda, to show that the Board adopted an appropriate resolution to transfer and credit petitioner's accrued sick-leave time from the Englewood School District in accordance with N.J.S.A. 18A:30-3.2. The pertinent language of the statute provides that, "The amount of any such [transferred] credit shall be fixed by resolution of the board uniformly applicable to all employees and subject to the provisions of this chapter." N.J.S.A. 18A:30-3.2. It is apparent, however, that the practice of crediting new employees with their transferred out-of-district accrued sick-leave time has been in effect since the Board's operation as a functioning school district. Out-of-district sick-leave credit for new hires was conducted through the office of the superintendent of schools without formal Board sanction. The superintendent's secretary acted as the custodian of employees' attendance and sick leave records. It was not until December 17, 1981, approximately 20 years after the regional school facility became operational, that the Board formally ratified the past practice to grant transferred out-of-district accumulated sick-leave days to its employees (P-3). Under the statutory provisions, the grant is to be "uniformly applicable to all employees." N.J.S.A. 18A:30-3.2. And, in accordance with the companion statute N.J.S.A. 18A:30-3.4, to be read in pari materia with N.J.S.A. 18A:303.2, provides that "The number of days when granted shall be irrevocable by the board of education of the district."

I **CONCLUDE**, therefore, by virtue of the Board's adopted policy to grant out-of-district accumulated sick-leave days, that petitioner was statutorily entitled to the 87.5 accumulated sick-leave days transferred from the Englewood Board of Education, to be added to those unused accumulated sick-leave days earned while in the employ of the respondent Board. N.J.S.A. 18A:30-3.1 et seq.

Employee sick leave is a statutory provision, thus mandated, to protect employees from the hardship of lost pay and other benefits while absent from duty due to illness. N.J.S.A. 18A:30-1 et seq. Unused sick leave "shall be accumulative to be used for additional sick leave as needed in subsequent years." N.J.S.A. 18A:30-3. The herein Board has elected, through appropriate statutory provisions, to provide its employees with

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the benefit of transferred accumulated unused sick days earned while employed in school districts other than its own. N.J.S.A. 18A:30-3.2 et seq. The grant, once adopted by the Board, is irrevocable. N.J.S.A. 18A:30-3.4.

The provision to compensate certain of its employees for unused sick-leave days upon their retirement is not embodied within the statutes and, therefore, lies within that broad ambit of the Board's discretion. The provision herein was the result of a collective negotiations agreement between the Board and its local education association. Consequently, it is discretionary and contractual in nature rather than statutory. It is apparent, moreover, that the Board has uniformly applied its negotiated, adopted and amended policy to compensate for unused sick-leave days to teaching-staff members who retire with ten or more years service in its employ; even to the extent of compensating for accumulated unused sick days earned from out-of-district (P-5, P-7).

Petitioner herein claims an entitlement to compensation for his out-of-district accumulated unused sick days upon his retirement. Petitioner set forth four theories for his claim to such entitlement: viz, (1) that he was credited with 87.5 out-of-district sick leave days; (2) the Board's refusal to grant this credit of 87.5 accumulated sick days upon his retirement was arbitrary, capricious and unreasonable in light of its prior practice; (3) petitioner did not waive entitlement to equal treatment in the payment for his out-of-district accumulated unused sick days upon his retirement; and, (4) the refusal by the Board to compensate him for his out-of-district unused sick days is contrary to public policy of this State.

The Board concedes that the Maywood decision does shed some light upon petitioner's argument that public policy supersedes any contrary contractual provisions requiring the same treatment for all employees with respect to payment for unused sick leave upon retirement. It further observes that the Maywood court held that each board of education had the discretion to make or not to make such payments unless the board was obligated to do so under a collective negotiation agreement. The Board argues that petitioner negotiated his own employment agreement with the Board and did not work under the terms of the collective negotiated agreement between the Teacher's Association and the Board.

The facts of this matter clearly demonstrate that petitioner and the Board engaged in extensive contractual negotiations subsequent to petitioner's announcement to

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the Board in 1983 that it was his intention to retire at the conclusion of the 1985 academic year (R-1, R-9). On January 26, 1984, at least one Board member believed that petitioner should receive no salary increase for the 1983-84 school year (R-9). After some discussion, the Board, by a split vote of five in favor and three opposed, compromised and agreed to grant petitioner a 2.5 percent salary increase which amounted to $1,500 for the 1983-84 school year (R-9). Subsequently, on May 10, 1984, the Board's chief negotiator reported to the Board in closed session as follows:

> The third session was held for collective bargaining - to review Mr. Keller's salary. Mr. Keller did not attend this session.
>
> Mr. Todd reported that Mr. Keller has 371 accumulated sick leave days plus 77 unused vacation days as of now. Payment of 25% of his daily rate for these days at retirement would amount to a considerable amount. Therefore, Mr. Keller would like the board to work out a deal whereby his increase would be greater in 1983-84 and 1984-85; he would retire in August 1985; and he would expunge some of his unused days from the record. This would give him a better retirement and not cost the board any money.
>
> If the Board goes along with Mr. Keller's request the terms and conditions would have to be in an agreement and signed.
>
> It was decided to give Mr. Keller an 8.5% increase in 1983-84 and an 8.5% increase in 1984-85. Previously, in a closed session, the board had decided on a 2.5% increase.
>
> A poll was taken on the 8.5% increase for each year and all approved except Mr. Lundholm.
>
> The closed session ended at 11:55 p.m.
>
> [R-8]

As a consequence of these negotiations and based upon petitioner's representation that he would forego compensation for certain unused sick-leave days for higher salaries for the 1983-84 and 1984-85 school years, the parties entered into the duly executed Superintendent's Employment Contract, dated June 13, 1984 (P-9). By this action, the Board modified its prior determination to grant petitioner a $1,500 salary increase for 1983-84 and, instead, awarded petitioner a $4,000 increase for each of the two years 1983-84 and 1984-85.

It is noted here that by their various terms and conditions, the collective negotiated agreements (R-10, R-11), between the Board and the Association excluded the

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position of superintendent. Consequently, petitioner was free to negotiate his own contract with the Board. To the extent that petitioner and the Board agreed to incorporate certain terms and conditions embodied in the Professional Employees Agreement (R-10, R-11), it was within the Board's direction to do so absent and unlawful act or against public policy. Kiamie v. Bd. of Ed. of the Tp. of Cranford, Union Cty., 1974 S.L.D. 218, 225. Here, the petitioner entered into arms-length negotiations with the Board in the formation of a bargain to which he manifested his assent to forego certain of his out-of-district unused accumulated sick-leave days in exchange for consideration of increased salary benefits. Petitioner freely entered into the contract with the Board, as evidenced by his signature (P-9), and was the beneficiary of the increased salary consideration for the 1983-84 and 1984-85 school years, among other things. Clause No. 5, to which petitioner now objects and contests, is unambiguous and clear on its face. Petitioner received the benefit for which he bargained; compensation for his unused sick days accumulated while in the Board's employ. The contract is explicit with reference to only in-district unused accumulated sick days. Petitioner received nothing less than that for which he bargained.

As discussed hereinbefore, the Board's adoption of the provisions in N.J.S.A. 18A:30-3.2 et seq. credited petitioner with 87.5 unused accumulated out-of-district sick-leave days. Such out-of-district sick days, coupled with those earned while employed in the Board's school district were to petitioner's benefit to be used when, and if, he were to become ill and, therefore, absent from his post of duty without the loss of pay and other benefits. Petitioner's transferred sick days, once approved by the Board, were irrevocable. N.J.S.A. 18A:30-3.4. The distinction here, however, is that while petitioner had a statutory grant of the transferred out-of-district sick days to be used for personal illness, the Board's allowance for compensation for unused sick-leave days upon retirement was contractual rather than statutory. Further, the negotiated agreement which incorporated the term and condition to grant compensation for unused sick-leave days to retiring teaching-staff members explicitedly and specifically excluded the position of superintendent of schools; therefore, leaving to the Board's discretion whether or not to confer such a grant upon petitioner. Within its discretionary authority, the Board entered into a duly executed contract with petitioner whereby the Board offered, and petitioner accepted, compensation for his earned and unused in-district accumulated sick days.

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Accordingly, I **CONCLUDE** that petitioner's claim for payment for those 87.5 credited unused accumulated sick-leave days transferred from the Englewood Board of Education is without merit and is hereby **DENIED.**

With respect to the Board's motions to dismiss on the grounds of; (1) untimely filing, (2) estoppel and waiver, I **FIND** that such arguments need not be addressed here inasmuch as the decision has been rendered upon the facts and merits of the case.

Accordingly, it is declared that petitioner's transferred accumulated out-of-district sick leave days were properly credited to him pursuant to the Board's adopted policy and in accordance with N.J.S.A. 18A:30-3.2 et seq., to be used for petitioner's personal illness while in the Board's employ. It is further declared that the Board's policy to grant compensation for unused accumulated sick-leave days upon an employee's retirement was and is contractual in nature under which the position of superintendent of schools is excluded, leaving, therefore, to the Board's discretion whether to grant or deny the benefit to petitioner. Finally, it is declared that petitioner entered into a duly executed arms-length contract with the Board, which he was free to do, whereby petitioner contracted to forego compensation for his accumulated out-of-district sick-leave days in consideration for higher salary payments by the Board for the 1983-84 and 1984-85 school years.

I **CONCLUDE,** therefore, that petitioner's Petition of Appeal be and is hereby **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

2 May 1986
DATE

Lillard E. Law
LILLARD E. LAW, ALJ

MAY 5 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

May 7, 1986
DATE

OFFICE OF ADMINISTRATIVE LAW

bc/ee

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EPHRAIM R. KELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE LOWER CAPE MAY REGIONAL SCHOOL DISTRICT, CAPE MAY COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties pursuant to N.J.A.C. 1:1-16.4a, b and c.

The Commissioner notes the following chronology for the record:

August 1972	Petitioner employed by the Board of Education of the Lower Cape May Regional School District.
1972-73	Petitioner requested and received letter from Englewood Board, his previous employer, representing that he had accrued 87.5 unused sick leave days while in the employ of Englewood Board.
1979-81	Lower Cape May Regional Board (hereinafter "Board") entered into agreement with Lower Cape May Regional Education Association (hereinafter "Association") providing for reimbursement of unused in-district accumulated sick leave in excess of 75 days to retiring teachers.
December 17, 1981	Board amended sick leave policy to provide credit to incoming employees formerly employed by other districts for all days of accumulated sick days.
1981-83	Board and Association entered into agreement which provided for reimbursement to teachers for unused sick leave at time of retirement who have 15 years of teaching experience in district.
1983-86	Board and Association entered into agreement which provided reimbursement for unused sick leave to teachers with 10 years of teaching experience at time of retirement.
1984	Petitioner announced intention to retire from his tenured position in or about 1985.

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June 13, 1984 — Petitioner and Board signed a contract setting his salary for 1983-84 and 1984-85 and providing for payment for unused sick days accumulated only while in the employ of the Board.

August 7, 1984 — Petitioner notified Association that sick leave days accumulated and transferred from other school district would not be recognized by Board and, therefore, would be stricken from the Board employees' records.

October 26, 1984 — Board granted those teachers in its employ out-of-district transferred accumulated sick leave days upon retirement.

April 25, 1985 — Petitioner requested Board pay him for unused sick leave days he had accumulated while employed by Englewood Board.

June 27, 1985 — Board denied petitioner's request for payment of out-of-district accumulated sick leave days upon his retirement.

June 30, 1985 — Petitioner resigned and retired from the Board's employ and was compensated for those unused accumulated sick leave days earned while employed by Board.

September 18, 1985 — Petition of Appeal filed.

Initially, the Commissioner concurs with the ALJ that the recommended initial decision, rendered upon the facts and merits of the case, precludes the need for discussion of the Board's motions to dismiss on the grounds of 1) untimely filing and 2) estoppel and waiver.

The Commissioner does not dispute that the ALJ is correct in determining that petitioner signed away, by the contract he entered into with the Board on June 13, 1984, any compensation for his accumulated out-of-district sick leave days in consideration for higher salary payment by the Board for the 1983-84 and 1984-85 school years. However, petitioner and the Board were mistaken, as was the ALJ, in concluding petitioner had any such accumulation of out-of-district sick leave days over which to bargain. N.J.S.A. 18A:30-3.2 states:

> Whenever a board of education employs any person who has an unused accumulation of sick leave days from another school district in New Jersey, the employing board may grant, not later than the end of the first year of employment, part or full credit therefor. The amount of any such credit shall be fixed by resolution of the board uniformly applicable to all employees and subject to the provisions of this chapter.

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A careful reading of the statute reveals:

1. The board is not obligated, but rather, may grant partial or full credit to an employee entering its district for the first time for unused accumulated sick leave from another school district in New Jersey;

2. The board, if it chooses to so grant partial or full credit therefor, must do so no later than the end of the first year of employment;

3. The board must pass a resolution indicating the amount of any such credit allowable;

4. The amount allowable must be applied to all employees uniformly;

5. The policy allowing such credit is prospective from the date the board passes its resolution creating the policy.

The Commissioner notes from the record that petitioner was employed by the Board fully nine years before the Board promulgated a policy incorporating the provisions of N.J.S.A. 18A:30-3.2. The record clearly establishes that the Board took no formal action within one year of petitioner's employ with respect to granting him out-of-district accumulated sick leave days, notwithstanding submission of documentation of his former employer as to the actual number of days accrued outside of the Board's employ. Further, since "in the legal tradition there is an attitude *** hostile to retroactivity in legislation,"[1] it becomes entirely clear, in the Commissioner's opinion, that petitioner did not acquire out-of-district sick leave because the Board failed to properly transfer such days. Petitioner's argument that the Board's past practice of providing such credit to other employees before its policy was developed is without merit. That other employees of the Board who retired before the December 17, 1981 policy was promulgated were granted accumulated sick leave days transferred in contravention of law does not entitle petitioner to similar treatment.

Further, the Board's sick leave policy promulgated on December 17, 1981 is similarly prospective. It provides, among other things, as follows:

> 4. The Board will grant credit to incoming employees formerly employed by other districts for all days of accumulated sick days. (emphasis supplied)
>
> (Initial Decision, ante)

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[1]Horace E. Read, John W. MacDonald, Jefferson B. Fordham, and William J. Pierce, Materials on Legislation, Fourth Edition (New York: The Foundation Press, Inc. 1982), p. 569.

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Thus, petitioner is afforded no further entitlement as a result of the Board's policy, which was promulgated nine years after his employment, contrary to the determination of the ALJ. The Commissioner does agree with the ALJ, however, that

> [t]he provision to compensate certain of its employees for unused sick-leave days upon their retirement is not embodied within the statutes and, therefore, lies within that broad ambit of the Board's discretion. The provision herein was the result of a collective negotiations agreement between the Board and its local education association. Consequently, it is discretionary and contractual in nature rather than statutory.
> (Initial Decision, ante)

He does not agree, though, with the ALJ's next statement:

> It is apparent, moreover, that the Board has uniformly applied its negotiated, adopted and amended policy to compensate for unused sick-leave days to teaching-staff members who retire with ten or more years service in its employ; even to the extent of compensating for accumulated unused sick days earned from out-of-district (P-5, P-7). (emphasis supplied)
> (Initial Decision, ante)

The contract agreements entered into between the Board and the Association herein compensate teachers for unused sick leave at the time of retirement. The Commissioner notes that there is a difference between a teaching staff member and a teacher. The former is defined in statute at N.J.S.A. 18A:1-1:

> "Teaching staff member" means a member of the professional staff of any district or regional board of education, or any board of education of a county vocational school, holding office, position or employment of such character that the qualifications, for such office, position or employment, require him to hold a valid and effective standard, provisional or emergency certificate, appropriate to his office, position or employment, issued by the state board of examiners and includes a school nurse.

Since a superintendent is required to hold a valid and effective certificate, any individual holding such position is a teaching staff member. "Teacher" is not defined in statute but is clearly distinguishable from the statutorily defined teaching staff member. A superintendent, while he may, in fact, teach, is not considered a "teacher". Thus, the contracts entered into by the Board and the Association mentioned herein, have no bearing on petitioner's situation, not only because of the above-stated distinction, but also because the

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> negotiated agreement which incorporated the term and condition to grant compensation for unused sick-leave days to retiring teaching-staff members explicitedly (sic) and specifically excluded the position of superintendent of schools***. (Initial Decision, ante)

Therefore, it was a matter of Board discretion whether or not to confer such a grant upon petitioner. The Commissioner concurs with the ALJ on this point.

As further noted by the ALJ, within its discretionary authority,

> the Board entered into a duly executed contract with petitioner whereby the Board offered, and petitioner accepted, compensation for his earned and unused in-district accumulated sick days. (Initial Decision, ante)

The only days for which petitioner was compensated in the contract between him and the Board were those unused sick days accumulated while in the employ of the Board, which was appropriate in light of the fact that he never had out-of-district sick days properly credited to him.

Accordingly, the initial decision is affirmed, as modified herein relative to the retroactive application of N.J.S.A. 18A:30-2. The Petition of Appeal is hereby dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

June 13,1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3021-86
AGENCY DKT. NO. 147-4/86

IN THE MATTER OF THE ANNUAL SCHOOL ELECTION HELD IN THE SCHOOL DISTRICT OF THE BOROUGH OF FORT LEE, BERGEN COUNTY

Joseph R. Mariniello, Esq., for petitioner

Jack A. Urscheler, Esq., for respondent

Scott A. Weiner, Esq., for intervenor
(Pininich, Rigolosi & Selser, attorneys)

Record Closed: June 5, 1986 Decided: June 10, 1986

BEFORE **KEN R. SPRINGER, ALJ:**

Statement of the Case

This is an inquiry by the Commissioner of Education pursuant to N.J.S.A. 18A:14-63.12 into alleged violations of statutorily prescribed procedures for school elections. The dispute arises out of the annual election for membership on the Board of Education of Fort Lee, New Jersey. Petitioner Sydney Becker, a defeated candidate who lost by only one vote, alleges the occurrence of several irregularities which might affect the outcome of the election. These allegations include: (1) Joseph Adornato of 505 North Avenue, Fort Lee is shown by public records to have cast an absentee ballot and a polling place ballot, so that "Mr. Adornato either voted twice or someone fraudulently voted on his behalf";

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(2) The signature of Susan Ann B. Koby of 200 Linwood Avenue, Fort Lee appears in two places on the poll list in different handwriting styles;[1] (3) Debra and Norman Gultz, daughter and son-in-law of one of the candidates, and Charles Bartlett, school board secretary, voted in the election although they do not reside in the school district; (4) three sets of voters received duplicate ballot authorization numbers; and (5) other unidentified voters "apparently voted without receiving a voter authorization slip."

There are no charges that any of the candidates encouraged or participated in the alleged violations. Candidate Susan I. Candee, who defeated petitioner by one vote, has intervened in this proceeding and joins in the request that "a runoff election be held between [herself] and Sydney Becker at the earliest possible date." Respondent Board of Education of Fort Lee ("Board") does not oppose the requested relief. Since the proof presented on the first charge alone is sufficient to invalidate the election results as between Candee and Becker, it is unnecessary to reach the remaining issues raised by the complaint.

Procedural History

The school election was held on April 15, 1986. At the request of losing candidate Becker, on April 23, 1986 the Commissioner of Education conducted a recount of the votes cast on voting machines. On the same date, the Bergen County Board of Elections conducted a recount of the absentee ballots. As a result of the recount, on May 2, 1986 the Commissioner issued a written decision confirming the original tally of all votes. Meanwhile, on April 25, 1986, Becker filed a complaint with the Commissioner requesting an inquiry into the alleged violations of school election law. On May 5, 1986, the Commissioner transmitted the matter to the Office of Administrative Law for handling as a contested case. During a prehearing conference on May 30, 1986, the Office of

[1]Becker does not accuse Koby of any wrongdoing. Petitioner's counsel represents that he contacted Koby, who informed him that the first signature is genuine and the second signature is forged.

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Administrative Law granted an application by Susan I. Candee for intervention status. On June 3, 1986, Becker filed a motion for summary decision, together with supporting certification and brief. Intervenor Candee notified the Office of Administrative Law on June 5, 1986 that she has "no objection" to the granting of petitioner's motion. The motion has been submitted on June 6, 1986 for ruling on the papers.

Findings of Fact

All of the material facts are undisputed. From the motion papers, including the certification of Joseph R. Mariniello dated June 2, 1986, I FIND the following facts:

Six candidates ran for three full terms on the Board. According to both the original tally and the recount conducted by the Commissioner of Education, Susan I. Candee and Sydney Becker were only one vote apart, with 612 votes and 611 votes respectively.[2] Of the 612 votes received by Candee, four were cast by absentee ballot. With a total of 645 votes, the next lowest successful candidate, Salvatore A. Trovato, had 33 more votes than Candee.

---

[2]The official count was set forth by the Commissioner in tabular form:

	At Polls	Absentee	Total
Jo-Ann Ferrante Rivera	656	4	660
Salvatore A. Trovato	639	6	645
Susan I. Candee	608	4	612
Sydney Becker	607	4	611
Roselin Ottenheimer	507	5	512
Willie Nichson	116	0	116

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Neither petitioner nor anyone else suggests the existence of wholesale voting fraud or widespread irregularities. Even if all of the allegations made by Becker were proven true, the difference would not be sufficient to overcome the 33-vote margin of victory enjoyed by Trovato. Similarly, the next highest losing candidate, Roselin Ottenheimer, received 512 votes, or 99 votes less than Becker. Therefore, Ottenheimer could not possibly win, even if each of the challenged votes were rightfully hers. Due to the closeness of the race between Candee and Becker, however, a change of a single vote could create a tie for the third seat on the Board.

Insofar as the first charge is concerned, in March 1986 one Joseph Adornato requested an absentee ballot to vote in the Fort Lee school election. Election officials mailed an absentee ballot to him at 505 North Avenue, Fort Lee, New Jersey 07024. An absentee ballot in his name was returned on April 4, 1986 and counted as one of the votes in the election. It cannot be ascertained from the existing record for which candidate this vote was cast. Likewise, the poll list maintained by the Board indicates that a Joseph Adornato, living at the same address, also voted on April 15, 1986 at the polling place. Again the record does not reveal for which candidate this second vote was cast. What is clear is that two votes were counted in the name of one registered voter in the school election.

As soon as these facts came to the attention of petitioner, she commenced an action in the Superior Court of New Jersey, Law Division, invoking its jurisdiction over "the counting, certification and contesting of absentee ballots." By order entered on June 2, 1986, the Honorable Arthur L. Troast found that "one absentee ballot vote is hereby declared void" and, further, "that the voiding of this absentee ballot could be sufficient to change the result of the election between Susan I. Candee and Sydney Becker." Judge Troast expressly directed that "a copy of this Order shall be served upon the Commissioner of Education of the State of New Jersey for action pursuant to N.J.S.A. 18A:14-63.13 and other applicable law[.]"

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Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the improper absentee ballot affected the outcome of the election and, consequently, that a runoff election must be held.

N.J.S.A. 18A:14-63.12 provides that the Commissioner of Education or his authorized representative shall "inquire into alleged violations of statutorily prescribed procedures for school elections, to determine if such violations occurred, and if they affected the outcome of the election." Where the Commissioner finds as a result of a recount that an error has occurred which alters the result of the election, he shall order "such relief as is appropriate." N.J.S.A. 18A:14-63.13. While this section refers specifically to recounts, another section deals with the filling of vacancies resulting from improper election procedures. N.J.S.A. 18A:12-15(d) mandates that, for Type II districts having elected boards of education, vacancies must be filled:

> . . . [b]y special election if there is a failure to elect a member at the annual school election due to improper election procedures. Such special election shall be restricted to those persons who were candidates at such annual school election, shall be held within 60 days of such annual school election, and shall be conducted in accordance with the procedures for annual and special elections set forth in chapter 14 of Title 18A of the New Jersey Statutes.

Generally, the Commissioner of Education will refuse to set aside an election unless it is clearly demonstrated that "the will of the electorate . . . has been thwarted" In re Annual Sch. Elec., Greater Egg Harbor Reg. Sch. Dist. 1978 S.L.D. 11, 20 (Comm'r of Ed. 1978).

Past administrative agency decisions have consistently held that the Commissioner of Education lacks jurisdiction to resolve disputes concerning absentee ballots which arise under the Election Law, Title 19. In re Annual Sch. Elec., Sch. Dist. of

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Fairview, OAL Dkt. EDU 2483-81 (May 13, 1981); In re Annual Sch. Election, Sch. Dist. of Rutherford, 1974 S.L.D. 381 (Comm'r of Ed. 1974); In re Annual Sch. Elec., Sch. Dist. of Monroe, 1973 S.L.D. 212 (Comm'r of Ed. 1973), adopted 1974 S.L.D. 1413 (St. Bd. 1974). For present purposes, it is unnecessary to examine whether this is an unnecessarily narrow interpretation of the Commissioner's jurisdiction over the conduct of school elections. But see, Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184, 187 (App. Div. 1979) (Commissioner of Education has "incidental jurisdiction" to determine issues arising under the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., as they relate to controversies under the school laws). Here the Superior Court has already made a finding that the absentee ballot in question is void and has referred the matter to the Commissioner of Education for appropriate relief. That ruling, by a court of competent jurisdiction, N.J.S.A. 19:57-24, is conclusive as to the facts and is binding upon an administrative agency in a case involving identical issues and parties. City of Hackensack v. Winner, 162 N.J. Super. 1, 27-30 (App. Div. 1978), mod. on other grounds 82 N.J. 1 (1980).

In addition to any Title 19 violation, the facts also constitute a violation of that portion of Title 18A making anyone "who votes fraudulently" or "who votes more than once at any one election" guilty of a crime. N.J.S.A. 18A:14-77. Thus, the requirement that there be a violation of "statutorily prescribed procedures for school elections" has clearly been satisfied in this instance. Under similar circumstances, the Commissioner of Education has declared that invalidation of a single vote can affect the result in a tight race. In re Annual Sch. Elec., Sch. Dist. of South River, 1968 S.L.D. 84 (Comm'r of Ed. 1968). Finding that an illegal vote had been cast, the Commissioner commented:

> It cannot reliably be determined for whom the unregistered person voted. But, since even one vote is enough to affect the outcome of the election as between candidate Bodnar (535) and Golaszewski (534), the election cannot be regarded as conclusive with respect to either or them. See In re: Dorgan, 44 N.J. 440 (1965).
>
> 1968 S.L.D. at 86.

Lastly, the type of remedy to be granted must be carefully considered. The choice is between a new election for the entire slate of candidates or a runoff limited to the two candidates whose relative positions could conceivably be affected by the improper

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vote. As previously noted, the special election must be "restricted to those persons who were candidates" at the initial school election. N.J.S.A. 18A:12-15(d). Such language does not necessitate a contest among all the original candidates, but merely precludes new candidates from entering the field at this late date. To the maximum possible extent, relief should be molded to fit the particular needs of the parties. Both candidates have requested a runoff rather than a new election. It is inappropriate to grant more relief than necessary to solve the actual problem. Absent convincing proof of widespread election fraud, it would be unfair to deprive the two clear frontrunners of their victories merely because of doubt regarding the third place winner. Indeed, such a rule might unintentionally encourage fraud by providing a means for challenging those with a clear margin of victory. In the interest of justice and fairness, the remedy should be a runoff and not a new election.

Order

It is **ORDERED** that election of Susan I. Candee to a seat on the Fort Lee Board of Education is hereby set aside.

It is further **ORDERED** that the Fort Lee Board of Education make immediate arrangements to conduct a runoff election between Sydney Becker and Susan I. Candee in compliance with N.J.S.A. 18A:12-15(d).

And it is further **ORDERED** that a copy of any final agency decision be served on the Attorney General of New Jersey and Bergen County Prosecutor's Office for investigation of possible criminal violations.

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This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

June 10, 1986
DATE

KEN R. SPRINGER, ALJ

June 10, 1986
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE BOROUGH	:	DECISION
OF FORT LEE, BERGEN COUNTY.	:	
	:	

The Commissioner has reviewed the record of this matter including the initial decision rendered by the Office of Administrative Law.

It is noted that both candidates, Sidney Becker and Susan I. Candee, have represented on the record that they do not oppose the findings of fact and conclusions of law reached by the ALJ upon which this initial decision is predicated.

The Commissioner is also persuaded by those findings and conclusions reached by the Superior Court as well as the ALJ herein that there was a violation of statutorily prescribed election procedures sufficient to alter the results of the outcome of the annual school election held in the School District of the Borough of Fort Lee. Therefore, the election of Susan I. Candee to a full three-year term on the Board is hereby set aside.

Accordingly, pursuant to the provisions of N.J.S.A. 18A:12-15(d) the Commissioner hereby declares that a vacancy exists on the Board for the full three-year term heretofore filled by

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Susan I. Candee by virtue of the invalidation of her one vote margin over candidate Sydney Becker.

The Commissioner also concurs with that conclusion of the ALJ which excludes all other candidates except Sydney Becker and Susan I. Candee from participating in the upcoming runoff election. This is so because the margin of the difference of the total votes cast for each of the other candidates is sufficient to warrant their exclusion.

Now therefore, it is so ordered on this _____ day of June 1986 that the Fort Lee Board of Education make immediate arrangements to conduct a runoff election between Sydney Becker and Susan I. Candee for the vacated full three-year term on the Board in compliance with the provisions of N.J.S.A. 18A:12-15(d) and 18A:14-1 et seq.

The Commissioner further orders that a copy of this decision be served on the Attorney General of New Jersey and the Bergen County Prosecutor's Office for investigation of possible criminal violations.

COMMISSIONER OF EDUCATION

JUNE 13, 1986

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5749-84
AGENCY DKT. NO. 233-6/84

BOARD OF EDUCATION OF THE BOROUGH OF LAWNSIDE,
Petitioner,
v.
BOARD OF EDUCATION OF THE BOROUGH OF HADDON HEIGHTS,
Respondent.

Harvey C. Johnson, Esq., for petitioner

Anne McDonnell, Esq., for respondent (Hannold, Caulfield, Marshall & McDonnell, attorneys)

Record Closed: March 19, 1986 Decided: May 5, 1986

BEFORE **AUGUST E. THOMAS,** ALJ:

Petitioner challenges the denial of admission to the Haddon Heights High School chapter of the National Honor Society (NHS) of S.S., a senior at the high school in the school year 1983-84. Petitioner claims that the selection process for admission to the NHS is arbitrary, capricious, administered inconsistently and violative of the guidelines of the National Honor Society. Petitioner asserts also that S.S.'s denial to admission to the NHS is violative of her right to due process.

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The matter was filed in the Office of the Commissioner of Education on June 25, 1984. The Answer was filed on July 11, and on August 1, the matter was transmitted to the Office of Administrative Law as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held by former Administrative Law Judge Judith Wizmur who issued a Prehearing Order on September 18, 1984. Discovery was difficult and required a written Order by ALJ Wizmur on January 4, 1985 to compel more specific answers to interrogatories and to answer supplemental interrogatories propounded by petitioner. The hearings scheduled for January 7 and 8, 1985, had to be adjourned.

On January 9, 1985, petitioner filed an Amended Petition of Appeal. Earlier on May 11, 1984, petitioner had filed a complaint with the Division on Civil Rights. On October 9, 1984, the Division referred its complaint to the Commissioner at the Department of Education. The Amended Petition includes the Civil Rights complaint that the Board violated the New Jersey Law Against Discrimination by excluding S.S. from the NHS (N.J.S.A. 10:5-1 et seq.; New Jersey Constitution; United States Constitution). The Amended Answer was filed in the Office of Administrative Law on January 18, 1985, at which time this case was assigned to me.

On February 11, 1985, and after a three-way telephone conversation with counsel, I Ordered the Board to supply more specific answers to interrogatory no. 6.

On May 5, 1985, petitioner requested that the hearings scheduled for May 28, 29, and 30 be adjourned because of the unavailability of witnesses. Some are out-of-state college students including S.S. who is now a college sophomore.

With discovery nearly completed, respondent filed a Motion to Dismiss with supporting document and Affidavits on July 16, 1985. Petitioner filed a letter brief in opposition to the motion and respondent filed a reply to the letter brief in opposition to the motion on July 31, 1985. By Order dated August 5, 1985, I DENIED the Motion to Dismiss and directed the parties to proceed to hearing.

Hearings were conducted in the Oaklyn, Audubon and Haddon Heights municipal buildings on six days; August 20, September 20, October 7, 8; and November 18

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and 19, 1985. Letter briefs and reply briefs were filed after the hearing, the last of which was received on March 19, 1986, at which time the record was closed.[1]

PROCEDURAL HISTORY AND POSITIONS OF THE PARTIES

The Lawnside Board of Education (hereafter Lawnside) filed this appeal on behalf of S.S., one of its former pupils who resides in Lawnside. Lawnside is a K-8 elementary school district which sends its pupils to Haddon Heights High School (H.H.H.S.) pursuant to a sending-receiving relationship which has been established for many years.[2] One of Lawnside's complaints is that it has no say in policy matters which are established by the Haddon Heights Board.

S.S., who is black, was a senior pupil in HHHS in the September 1983-84 school year. She had established an exceptional academic record and was ranked fifth from the top of her class of 183 pupils at the end of her junior year in June 1983 (R-8). Additionally, S.S. had received several honors and awards because of her academic excellence and because of her involvement in extra-class activities (ECA). Nevertheless, she was not elected to membership in the NHS.

The procedure utilized for the selection of pupils to the NHS was described by its advisor. An announcement was made to seniors over the school's public address system in September 1983 that the NHS selections would be made in spring 1984 and that all pupils with a grade point average (GPA) of 85 or above at the end of the junior year would be considered. After checking the GPA of all eligible pupils for accuracy a mandatory meeting of those eligible seniors was held to explain the selection process. Each pupil was given a form to fill out (R-1) on which they were asked to list the activities in which they were involved and any other activity they wished considered, in or outside of the school. S.S. submitted her completed form (R-3).

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1 The ALJ was on sick leave from January 6 to February 3, 1985. An earlier briefing schedule was extended at the request of the parties.

2 The Lawnside Board President testified that he had lived in Lawnside for 70 years and graduated from Haddon Heights High School in 1932.

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The NHS handbook establishes four criteria against which each eligible pupil is measured when being considered for membership. Those criteria are: Scholarship, Service, Leadership, and Character (R-6). Rating points are awarded in each category as follows:

"4," outstanding - highly worthy of membership
"3," superior - worthy of consideration
"2," average - but worthy of consideration
"0," weak - not worthy of consideration
(J-1, #3)[3]

These ratings are then applied to the four criteria by each of the pupils' teachers and a numerical sum is derived. When divided by the number of teacher's ratings the individual pupil's numerical average is determined (J-1, #6). S.S. received a total of 175 points given in 54 evaluations by a number of her teachers. Her point average was 3.24 (J-1, #6).

At this juncture an overview of the NHS selection procedures, as outlined in its handbook - Appendix II, is in order (P-2). Each school is encouraged to develop its own selection procedures designed to meet the school program. The schools are also encouraged to be as objective as possible and cautioned that subjective methods may be suitable only for small schools in which the faculty is well acquainted with all of the pupils. HHHS followed the NHS guidelines in general with modifications designed for local use. However, there was a significant departure from an objective evaluation in the area of scholarship. Pupils' GPA's were not ranked or rated other than meeting the minimum requirement of an 85 to be eligible for NHS consideration. The faculty advisor testified that a pupil with an 86 average in scholarship who was working to his/her maximum potential could get a 4 (four) in scholarship. Therefore, even a scholarship rating was highly subjective. GPA's were not available to the selection committee when it evaluated pupils' scholarship. As shown above, the sums of the scores in the four areas evaluated were divided by the number of evaluators to reach each pupil's final point average, which was 3.24 for S.S. The pupils' point averages were then plotted on a frequency distribution chart. (R-5 is a sample. The actual chart was destroyed). After examining this chart the selection committee decided on a cut-off point of 3.5 prior to reviewing any candidates. The pupils' identities were not known prior to establishing the cut-off point. After the cutoff point was decided, the faculty advisor(s) read to the

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[3] The NHS procedures use the figures 4, 3, 2, 1, HHS uses a 0 in place of the 1.

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selection committee the information sheets for all pupils whose average evaluation was 3.5 or higher. These pupils were voted on separately and all pupils with a 3.5 average or higher were selected for induction into the NHS.

Pupils whose evaluations ranked between 3.5 and 3.0 were then read to the selection committee by the advisors. Three pupils below 3.5 were also selected for induction into the NHS. All three had average evaluations higher than S.S. Their selection was based on "outstanding" service which each had performed. Class rank was not considered by the selection committee. The class ranking of the pupils inducted was 1, 2, 3, 4, 9, 12, 13, 15, 18, 23, 26, 31, 33, 34, 51, and 67 (J-4).

As earlier stated, in addition to the four criteria utilized for evaluating pupils, the selection procedure also included the evaluation of pupils' activities in the school and in the community. The Haddon Heights Board points out that S.S. listed no community activities on her form (R-3); however the form does list ten ECA's in which she was involved; and offices and positions she held in four of those activities. S.S. was a Rutger's Scholar in 1983 and listed in a "Who's Who" in 1983.

There was much discussion concerning the Rutger's Scholars Program as compared to activities of three other pupils who were selected for induction whose point averages were also below 3.5. The activities of those three pupils follow:

One pupil's extraordinary activity was his narrative on his information sheet concerning his community service to senior citizens and his performance as the school's announcer at football games. A second pupil included information about her participation in a pre-nursing program at the hospital, and the third student included information concerning her participation in a music program with the Philadelphia Orchestra. S.S. included no information concerning any community service; however, her attorney was able to establish in the record that the selection committee knew very little about her being selected as the only pupil to attend the Rutger's Scholars Program. The Rutger's Scholars Program is not a community service activity; nevertheless, it was a unique selection, S.S. being the only Haddon Heights student so honored. The record demonstrates that her participation in the Rutger's Scholars Program was not understood nor discussed by the selection committee when it considered these four pupils for selection to the NHS. And although the pupil who assisted senior citizens provided a

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community service, the pupil at the hospital was involved in a work-study program. The pupil who practiced with the Philadelphia Orchestra was not providing a community service for HHHS.

There are references in the record which indicate that some of those pupils selected for induction in the NHS participated in the minimum three activities. Apparently, the three pupils elected with point averages below 3.5 participated in only one or two activities. It also appears from the record that S.S.'s involvement in as many as 10 activities may have worked against her being selected for NHS membership. For example, the Board's evidence shows that several teachers did not give S.S. higher points in their evaluations because she had to leave their sponsored activities early to attend girls' field hockey practice. On occasion S.S. would attend her afternoon activities such as the yearbook, or Knowledge Bowl, in her field hockey uniform. However, when she left early for hockey practice she was marked down for not being able to participate in her club activities and she was also marked down for being late to girls' field hockey practice.

The evaluations of S.S. show that her weakest areas were in service and particularly leardership. The record shows that she was a quiet young lady, not given to overt demonstrations that are commonly associated with leadership qualities. However, S.S. volunteered some of her service as a tutor for pupils having difficulty in a particular subject. One of her witnesses testified that S.S. had helped her considerably in some of her course work. S.S.'s attorney argued that this is leadership by demonstration. Curiously, one evaluator gave S.S. a zero in service and two in leadership.

When S.S. learned that she had not been selected for membership in the NHS both she and her mother asked the principal, the Superintendent, and the advisor for the reasons. They were not given reasons nor were they satisfied with the explanations given by the school officials. Thereafter, the Lawnside school principal contacted the Haddon Heights Superintendent of Schools seeking further explanation and resolution of the problem. Counsel became involved in a meeting which included S.S. and her mother along with the Superintendent; however, when no resolution could be reached, the instant Petition of Appeal was filed.

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Counsel for the Lawnside Board argued that Lawnside should be granted Summary Decision in its favor for the Haddon Heights' Board's failure to provide specific answers to interrogatories as ordered by both Judge Wizmur and myself. He also asserts that the testimony gleaned at hearing clearly demonstrates that several of the reasons set forth for the nonselection of S.S. to the NHS were not, and could have been considered by the selection committee in reaching its determination. Specifically, only those activities which concluded in the spring of 1983 could be considered when evaluating a pupil for selection in the NHS. Yet, the record shows that several activities on which the selection committee allegedly relied were not concluded until the end of the school year in 1984. Since the NHS selection was made in February 1984, counsel argues that these activities were not only not considered by the selection committee but that he was misled by information furnished Board counsel who advised him of the committee's "reasons" in her letter dated April 11, 1985 (J-1, #9). Lawnside counsel argues, therefore, as a result of these "deceptions" he was completely misled in the discovery and was in no position to defend against the real reasons for the non-selection of S.S. which were set forth at the hearings. Lawnside seeks to strike the Haddon Heights Board's defenses and the award of a default judgment.

This motion is **DENIED.** Although Lawnside was not given all of the specifics sought in discovery, the record shows that some of the specifics were unavailable or unknown. The record also shows that the NHS selection committee records are destroyed after the selection process is completed. In the present matter, the records were destroyed at the end of the year, but prior to the filing of the instant Petition of Appeal (Board letter to Lawnside counsel dated January 22, 1985). Further, there is sufficient evidence through the testimony of the Board's witnesses that much of the information which the Board was able to reconstruct was provided to Lawnside counsel. For these reasons, the matter will be decided on its merits.

CONCLUSIONS OF LAW

As far as the allegations of racial discrimination are concerned, I **FIND** no evidence of such in the record. The president of the Lawnside Board of Education testified without refutation about a pattern of discrimination and denied opportunity for blacks in the Haddon Heights School District. However, even accepting the totality of his testimony as being true, this is not evidence of discrimination against S.S. From my

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review of this record and my analysis of the testimony of the several teachers, it appears to me that S.S. was an outstanding student and very involved in ECA's throughout her high school career. However, she was quiet, unassuming, and somewhat reserved. As a result, she scored very highly in scholarship and character, but she did not do well in leadership and service. The combination of these four criteria as applied to the NHS selection procedure, caused S.S. to fall below the 3.5 cut-off point, and the selection committee failed to consider her involvement in ECA's in sufficient depth so that she could qualify for selection to the NHS.

CONCLUSION

The selection committee's reasons as now presented to S.S. are shallow, and almost meaningless when weighed against the achievement of this very talented and academically gifted pupil who was denied admission to NHS based on the subjective judgments of her teachers. The record shows that her teachers did not know, nor did they understand the extent of S.S.'s involvement in ECA's. They gave greater weight to the activities of three other pupils, who also did not achieve a 3.5 point average, than they did to the activities in which S.S. was involved.

How does one measure the contribution of a pupil who helps senior citizens, announces football games; practices with the Philadelphia Orchestra; or enters a hospital program in furtherance of her prospective career in the medical field? It seems to me that the pupils and the school benefit from the delivery of these services as reflected on Haddon Heights. Similarly, the many ECA's to which S.S. belonged and her selection as the only pupil in the Rutgers Scholars Program was likewise a positive reflection on Haddon Heights.

Here we are dealing with outstanding pupils. Unfortunately, a selection process which is so finely tuned as the one presented here, caused a line to be drawn which excluded S.S., Haddon Heights number 5 academic pupil.

In my judgment the actions of the selection committee were arbitrary for the following reasons:

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1. The objective standard of the GPA on which the NHS bases its selection was drastically altered to be a subjective component. Therefore, GPA did not count at all, and pupils who worked to the best of their abilities were able to receive a higher point average for NHS purposes even if they had a lower GPA.

2. Pupil's information sheets were accepted as offered so that there was no confirmation of the activities they listed or the degree to which they participated. Whatever the pupil listed was accepted as fact.

3. Two teachers admitted their unfamiliarity with the NHS handbook.

4. Several teachers testified that they had no knowledge about the prerequisites or the duties of the two pupils, one who performed at the hospital, the other with the Philadelphia Orchestra.

5. Neither had they any knowledge of the prerequisites, purpose, or duties included the Rutgers Scholars Program.

6. The NHS selection committee advisor had little or no knowledge of these ECA's.

7. Only one committee member attended a football game and heard it announced.

8. None of the teachers could identify one pupil's duties or course of study at the hospital.

9. Nothing in the record indicates that each one of the pupils with a point average below 3.5 participated in more than one ECA; yet, the guidelines recommended three to qualify for NHS selection. S.S. listed ten ECA's.

Based on all of the above, I **CONCLUDE** that the determination reached by the NHS selection committee was arbitrary because it was grounded on selection procedures not fully explained or discharged in the same manner by each of the different members of

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the selection committee. Based on its lack of knowledge of the extent of the activities of the four pupils considered who had averages below 3.5, the committee subjectively, and without a basis for reaching a reasoned determination, arbitrarily denied S.S. admission to the NHS.

It was stated by the Commissioner in John J. Kane v. Bd. of Ed. of the City of Hoboken, Hudson Cty., 1975 S.L.D. 12, that:

> "***[T]he Commissioner will not substitute his judgment for that of a local board when it acts within the parameters of its authority. The Commissioner will, however, set aside an action taken by a board of education when it is affirmatively shown that the action was arbitrary, capricious, or unreasonable. See Erie Beckhusen et al. v. Board of Education of the City of Rahway et al., Union County, 1973 S.L.D. 167; James Mosselle v. Board of Education of the City of Newark, Essex County, 1973 S.L.D. 197 aff'd. State Board of Education, January 9, 1984; Luther McLean v. Board of Education of the Borough of Glenn Ridge et al., Essex County, 1973 S.L.D. 217, affirmed State Board of Education, March 6, 1974.***" (at p. 16)

I have CONCLUDED that there is no proof of racial discimination by the NHS or the Haddon Heights Board. However, I must also CONCLUDE that the selection committee's non-selection of S.S. for membership was not a sound, reasoned determination. Therefore, it is arbitrary and must be set aside.

The following quote from Preston K. Mears, et al. v. Board of Education of the Town of Boonton, 1968 S.L.D. 108 at 111, bears repeating here.

> "***The Commissioner does not contemplate that in every instance of a board's action in the application of its policies and rules the board will expressly formulate a statement of its reasons for such action. To be sure, in many instances the reasons may clearly appear in the minutes of the board's deliberations or even, in some instances, in the language of a resolution. However, the Commissioner recognizes the practical problems confronting boards of education in creating a record of all its discussions and formulating a statement of its reasons for all of its decisions, as if to anticipate a need to defend itself in litigation such as that herein. The evidence of reasonable action is not always so formally generated. But in the absence of such evidence, the Commissioner cannot discharge his duty to examine the exercise of a board's discretion where, as here, it is challenged, unless at the hearing or in some other proper manner the board is willing to

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> come forward with appropriate evidence that it acted with reason and not in an arbitrary, capricious, unreasonable, or discriminatory manner. Thus, while the burden of proof initially and in the ultimate sense rests with the petitioner in an action such as the instant matter, the Commissioner must be able to determine that some reasonable basis exists for the board's actions. Therefore, unless such basis appears to the Commissioner, the board's actions cannot be sustained.***" (Emphasis supplied)

See also: J.B.A. and A.M.A., Individually and as Guardian Ad Litem fo A.H.A. v. Bd. of Ed. of the Borough of Bernardsville, decided by the Commissioner, March 16, 1981; aff'd State Bd. of Ed., December 2, 1981; aff'd N.J. Superior Court (App. Div.), May 12, 1983, A-1985-81T3 (Unpublished).

Accordingly, the Haddon Heights Board is directed to induct S.S. into the Haddon Heights High School NHS by resolution, retroactively, as of the date of induction of the other members of her class, February 1984.

Except for the above relief, the remainder of the Petition of Appeal is **DISMISSED WITH PREJUDICE.**

This recommended decision may be affirmed, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

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I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

5 May 86
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ

Receipt Acknowledged:

MAY 5 1986
DATE

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DATE

Ronald L. Parker /ks
OFFICE OF ADMINISTRATIVE LAW

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